Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

Vol. 20 — JUNE 25, 1986 — No. 25

This issue contains:

U.S. Customs Service
  T.D. 86-108 Through 86-117
U.S. Court of Appeals for the Federal Circuit
  Appeal Nos. 86-555 and 86-603
U.S. Court of International Trade
  Slip Op. 86-55 Through 86-60

AVAILABILITY OF BOUND VOLUMES

See inside back cover for ordering instructions

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

The abstracts, rulings, and notices which are issued weekly by the U.S. Customs Service are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

U.S. Customs Service

Treasury Decisions

(T.D. 86-108)

Approval of Coastal Gulf & International, Inc., To Gauge Imported Petroleum and Petroleum Products

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of approval.

SUMMARY: Pursuant to § 151.43(b), Customs Regulations (19 CFR 151.43(b)), Coastal Gulf & International, Inc., P.O. Box 1156, Donaldsonville, Lousiana 70346, has applied to Customs for approval to gauge imported petroleum and petroleum products. It has been determined that Coastal Gulf & International meets all of the requirements to be a Customs approved public gauger.

Accordingly, the application of Coastal Gulf & International, Inc., to gauge imported petroleum and petroleum products in all Customs Districts is approved.

EFFECTIVE DATE: June 4, 1986.

FOR FURTHER INFORMATION CONTACT: Roger J. Crain, Technical Services Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-2446).

Dated: June 5, 1986.

ROGER J. CRAIN,
Chief, Technical Section,
Technical Services Division.

[Published in the Federal Register, June 12, 1986 (51 FR 21434)]

---

19 CFR Parts 4, 6, 24, 111, 123, and 145

(T.D. 86-109)

Amendments to the Customs Regulations Regarding Users Fees for Customs Services

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Interim regulations.

SUMMARY: This document amends the Customs Regulations on an interim basis to provide for the payment of specific fees to Customs for the processing of persons, aircraft, vehicles, and merchandise arriving in the U.S., as well as for the payment of an annual fee by customs brokers. These fees were authorized as part of the recently enacted Consolidated Omnibus Budget Reconciliation Act of 1985 and must be paid in exchange for a variety of services performed by Customs officers relating to the arrival of commercial vessels of 100 net tons or more; the arrival of commercial trucks; the arrival of railway cars; the arrival of many private vessels and aircraft; the arrival of passengers (with certain exceptions) aboard commercial vessels or aircraft; the preparation of documentation in connection with dutiable mail entries; and an annual fee from customs brokers. The amendments are being made on an interim basis due to the limited period of time available to initiate these changes before the law becomes effective. However, any written comments received will be considered before a final rule is issued.

DATES: Interim regulations effective on July 7, 1986. Written comments must be received on or before August 11, 1986.

ADDRESS: Written comments (preferably in triplicate) may be submitted to and inspected at the Regulations Control Branch, Customs Service Headquarters, Room 2426, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT:

Operational Aspects: Charles Davies, Office of Inspection and Control (202-566-9425).

Legal Aspects: Arthur I. Rettinger, Office of the Chief Counsel, (202-566-2482). On carrier fees, John A. Mathis, Office of Regulations and Rulings, (202-566-5706), U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

Accounting Aspects: Robert Hamilton, National Finance Center, (317-298-1308), c/o Revenue Accounting, P.O. Box 68901, Indianapolis, Indiana 46278.

SUPPLEMENTARY INFORMATION:

Background

Section 13031 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (the Act, Pub. L. 99-272), establishes a schedule of fees chargeable to users of various services provided by the Customs Service in connection with the processing of persons, aircraft, vehicles, vessels, and merchandise arriving in the U.S., as well as for the payment of an annual fee by customs brokers. In addition to

established specific fees, the Act sets forth certain limitations or conditions concerning the collection of fees, and authorizes the promulgation of such rules and regulations as may be necessary to carry out the provisions of the new law.

Prior to enactment of this legislation, Customs had no general legal authority to collect fees for the processing of persons, aircraft, vehicles, vessels, and merchandise arriving in or departing from the U.S. Customs does, however, have specific authority to charge fees under certain limited circumstances, such as when providing pre-clearance of passengers and private aircraft, when such services are of special benefit to particular persons. Customs also has authority to assess fees on operators of bonded warehouses and foreign trade zones and on the entry of vessels into ports. Further, Customs has authority to collect the navigation fees specified in § 4.98, Customs Regulations (19 CFR 4.98). Finally, Customs is authorized to receive reimbursement from carriers for overtime services provided during non-business hours, and reimbursement from local authorities for services provided to certain small airports.

By the terms of the Act, the Congress has given Customs the authority to collect fees for services provided in connection with:

(1) The arrival of commercial vessels of 100 net tons or more.

(2) The arrival of a commercial truck.

(3) The arrival of railroad cars, whether passenger or freight.

(4) The arrival of private vessels or aircraft.

(5) The processing of dutiable mail for which Customs prepares documentation.

(6) An annual fee for each customs broker permit held by individuals, partnerships, associations, or corporate brokers.

(7) The processing of each passenger aboard a commercial vessel or aircraft arriving from outside the U.S.

Fees for several of the above categories of services are subject to certain limitations which are detailed later in this document. However, one example of a limitation merits special mention. Pursuant to 46 U.S.C. 104 (see § 4.94, Customs Regulations (19 CFR 4.94)), pleasure vessels from certain nations are granted cruising licenses which exempt them, after they report their first arrival to Customs, from formal entry, from filing manifests, from obtaining permits to proceed between ports of the U.S., and from clearance for a period of one year. Although there is no specific exemption for such vessels in the Act, neither is there an indication that the Congress intended to revise 46 U.S.C. 104, which specifically exempts such vessels from "charges for entering or clearing, dues, duty per ton, or tonnage taxes." Thus, and administrative exception is being made. Owing to the mid-year implementation date for these new requirements, it has been decided that for the calendar year 1986 only, the annual one-time fee for private vessels and aircraft will be $12.50.

The main body of the amendments will appear as new §§ 24.22 and 111.96, Customs Regulations (19 CFR 24.22 and 111.96), with appropriate cross references added to the following parts of the Customs Regulations.

(1) For commercial vessels and passengers—Part 4, Customs Regulations (19 CFR Part 4).

(2) For private aircraft and commercial aircraft passengers—Part 6, Customs Regulations (19 CFR Part 6).

(3) For railroad cars and commercial trucks—Part 123, Customs Regulations (19 CFR Part 123).

(4) For mail entries—Part 145, Customs Regulations (19 CFR Part 145).

Comments

Before adopting the interim regulations as a final rule, Customs will give consideration to any written comments (preferably in triplicate) timely submitted. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on normal business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Customs Service Headquarters, Room 2426, 1301 Constitution Avenue NW., Washington, D.C. 20229.

Inapplicability of Notice and Delayed Effective Date Provisions

The statutory effective date for collection of user fees is July 7, 1986. In light of the limited deadline imposed upon Customs to implement these changes, it has been determined that, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure is impracticable. For the same reason, pursuant to 5 U.S.C. 553(d)(3), we are dispensing with a delayed effective date. However, before adopting final regulations, consideration will be given to all written comments timely submitted.

E.O. 12291 and Regulatory Flexibility Act

Because the amendments do not meet the criteria for a "major rule" within the meaning of § 1(b) of E.O. 12291, Customs has not prepared a regulatory impact analysis.

Because no notice or proposed rulemaking is required for these interim regulations, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

Paperwork Reduction Act

The collections of information contained in the interim regulations have been submitted to the Office of Management and Budget

pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3507). Notice of OMB action will be published in the Federal Register.

List of Subjects

19 CFR Part 4—Cargo vessels, Passenger vessels, Vessels, Yachts.
19 CFR Part 6—Air Carriers, Aircraft.
19 CFR Part 24—Accounting, Taxes.
19 CFR Part 111—Administrative practice and procedure, Brokers.
19 CFR Part 123—Canada, Mexico, Motor carriers, Railroads, Vessels.
19 CFR Part 145—Postal service.

Drafting Information

The principal author of this document was Larry L. Burton, Regulations Control Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

Amendments to the Regulations

Parts 4, 6, 24, 111, 123, and 145, Customs Regulations (19 CFR Parts 4, 6, 24, 111, 123, and 145), are amended as set forth below:

PART 24—CUSTOMS FINANCIAL AND ACCOUNTING PROCEDURE

1. The authority for Part 24, Customs Regulations, continues to read as follows:

Authority: 19 U.S.C. 66, 1202, 1624; 31 U.S.C. 9701; Pub. L. 99-272.

2. Part 24 is amended by adding a new § 24.22 to read as follows:

§ 24.22 Fees for Certain Services.

(a) *Definitions.* For purposes of this section:

(1) The word "vessel" includes every description of watercraft or other contrivance used or capable of being used as a means of transportation on water, but does not include aircraft or any ferry.

(2) The word "arrival" means arrival at a port of entry in the customs territory of the U.S., or any place serviced by a port of entry.

(3) The words "calendar year" mean the period from January 1 to December 31 of any particular year.

(b) *Fee for arrival of a commercial vessel of 100 net tons or more.* (1) The master, licensed deck officer, or purser of any commercial vessel of 100 net tons or more which is required to enter under § 4.3 of this Chapter, and any U.S.-flag vessel proceeding coastwise under § 4.85 of this Chapter shall, upon arrival, proceed to Customs

and tender a processing fee in the amount of $397 for the services provided. The fee shall be collected at each port of arrival.

(2) *Exceptions.* Foreign passenger vessels making at least three trips a week from a port in the U.S. to the high seas and returning to the same U.S. port, not having touched any foreign port or place, shall be exempt from the payment of an arrival fee, even though formal entry is still required.

(c) *Fee for arrival of a commercial truck.*

(1) *Commercial truck defined.* For the purposes of this paragraph, a commercial truck is defined as a self-propelled vehicle designed and used for the transportation of commercial merchandise, or the transportation of non-commercial merchandise on a for-hire basis. Empty trucks and truck cabs without trailers fitting this description are also included.

(2) *Fee.* The driver or other person in charge of a commercial truck or truck cab entering the customs territory of the U.S. shall, upon arrival at a port of entry in the customs territory of the U.S., proceed to Customs and tender the sum of $5 for the services provided.

(3) *Prepayment.* The owner or operator of a commercial truck may apply for a prepaid permit for a calendar year upon payment of $100. The following information, together with the payment, shall be provided:

(i) Vehicle make, model, and model year.

(ii) Vehicle Identification Number (VIN).

(iii) License numbers issued by state, province, or county.

(iv) Owner's name and address.

(4) Payment may be made to the Customs officer at the port of entry, or in accordance with the provision of paragraph (i) of this section. The prepaid permit will be in the form of a decal to be placed in the lower left hand corner of the truck windshield, prior to first clearance through Customs for any calendar year. No credit toward the annual fee shall be given for payments made at individual crossings.

(d) *Fee for arrival of each railroad car.*

(1) *Fee.* A fee of $5 shall be charged for each railroad car, whether passenger or freight, loaded or empty, upon each arrival at a port of entry in the customs territory of the U.S. The railroad company receiving a rail car in interchange at a port of entry or, barring interchange, the company moving a car in line haul service into the customs territory of the U.S., shall be responsible for payment of the fee. No fee shall be required for locomotives and cabooses, but the $5 fee shall be assessed for empty railroad cars which are dropped from an in-transit train in the U.S. and are placed in the railroad interchange system.

(2) *Prepayment.* Railroad companies may, at their option, prepay a $100 calendar year fee for each railroad car. This payment shall be remitted in accordance with the provision of paragraph (i) of

this section. No credit will be given for payments made toward the annual fee at individual crossings.

(3) *Payment and monthly statement procedures.* (i) The Association of American Railroads (AAR), and the National Railroad Passenger Corporation (AMTRAK), shall file monthly statements with the Director, National Finance Center, within 60 days after the end of each calendar month. Each statement shall indicate:

(A) The number of railroad cars entering the customs territory of the U.S. during the relevant period;

(B) The number of those railroad cars pulled by each carrier; and

(C) The total monthly processing fee due from each carrier.

(ii) The individual carriers shall remit the fees calculated by AAR, and AMTRAK shall remit the fees it has calculated, within 60 days after the end of each calendar month in which railroad cars entered the customs territory of the U.S. The submission of monthly statements and the remission of fees shall be in accord with the procedures specified in paragraph (i) of this section.

(4) *Maintenance of records.* The Association of American Railroads (AAR), and the National Railroad Passenger Corporation (AMTRAK) shall maintain all such documentation necessary for Customs to verify the accuracy of fee computations and to otherwise determine compliance under the law. Such documentation shall be maintained for a period of 3 years from the date of fee calculation. The AAR, AMTRAK, and each railroad company responsible for making fee payments shall advise the Director, National Finance Center, of the name, address, and telephone number of a responsible officer who shall be able to verify any statements or records required to be filed or maintained under this paragraph. The Director, National Finance Center, shall be promptly notified of any changes in the identifying information submitted. The information required to be submitted under this subparagraph shall be in accord with the procedures set forth in paragraph (i) of this section.

(5) *Exemptions.* No fee shall be collected under this paragraph for Customs services provided in connection with the arrival of any railroad car that is part of a train whose journey originates and terminates in the same country, if

(i) The car is part of the train when the train departs the U.S.; and

(ii) No passengers board or disembark from the car, and no cargo is loaded or unloaded from the car, while the train is within any country other than the country in which the train originates and terminates.

(e) *Fee for arrival of a private vessel or private aircraft.* Except as otherwise provided in this paragraph, the master or other person in charge of a private vessel or aircraft shall, upon first arrival at a port in the customs territory of the U.S. in any calendar year, proceed to Customs and tender the sum of $25 for the services pro-

vided. Only one $25 fee shall be collected in connection with arrivals of each private vessel or private aircraft in a calendar year. The $25 fee may be prepaid to Customs. A receipt for the payment of the fee shall be provided by Customs to the master or other person in charge of the private vessel or private aircraft and shall be retained as proof of payment. The proof of payment shall be presented to Customs upon each arrival of the vessel or aircraft. The requirements of this paragraph shall not apply to private pleasure vessels of less than 30 feet in length, so long as they are not carrying any goods required to be declared to Customs, nor to private pleasure vessels granted a cruising license under § 4.94 of this Chapter, during the pendency of that license. The fee specified in this paragraph shall be in addition to any overtime charges.

(f) *Fee for dutiable mail.* The addressee of each item of dutiable mail for which a Customs officer prepares documentation shall be assessed a processing fee in the amount of $5. When the merchandise is delivered by the Postal Service, the fee shall be shown as a separate item on the entry and collected at the time of delivery of the shipment along with any duty and taxes due. When Customs collects the fee directly from the importer or his agent, the fee will be included as a separate item on the informal entry or entry summary document.

(g) *Fee for arrival of passengers aboard commercial vessels and commercial aircraft.*

(1) *Fee.* Except as set forth in this paragraph, each passenger requiring Customs processing who is aboard a commercial vessel or commercial aircraft which arrives in the customs territory of the U.S. from a place outside thereof, shall be assessed a fee in the amount of $5 for the processing.

(2) *Exceptions.* The fee set forth in subparagraph (1) shall not be assessed for the following categories of arriving passengers:

(i) Persons whose journey originates in Canada, Mexico, a territory or possession of the U.S., or any adjacent island. The U.S. territories and possessions include American Samoa, Guam, the Nothern Mariana Islands, Puerto Rico and the U.S. Virgin Islands. The adjacent islands include all of the islands in the Caribbean Sea, the Bahamas, Bermuda, St. Pierre, Miquelon, and the Turks and Caicos Islands.

(ii) Crew members and persons directly connected with the operation, navigation, ownership, or business of the vessel or aircraft;

(iii) Diplomats, except for U.S. diplomats, who can show that their names appear on the accreditation listing maintained by the U.S. Department of State. In lieu of such listing an individual diplomat may present appropriate proof of diplomatic status to include possession of a diplomatic passport or visa, or diplomatic identification card issued by a foreign government;

(iv) Persons departing and returning to the U.S. without having touched a foreign port or place;

(v) Persons arriving as passengers on any aircraft used exclusively in the governmental service of the U.S. or a foreign government, including any agency or political subdivision thereof, so long as the aircraft is not carrying persons or merchandise for commercial purposes. Passengers on commercial aircraft under contract to the U.S. Department of Defense are exempted if they have been precleared abroad under the joint DOD/Customs Military Inspection Program; and

(vi) Persons arriving on an aircraft due to an emergency or forced landing when the original destination of the aircraft was a foreign airport.

(vii) Persons transiting the U.S. and not processed by Customs.

(3) The fees specified in this paragraph shall be collected under the following circumstances:

(i) When through tickets or travel documents are issued indicating travel to the U.S. which originates in a location other than as specified in subparagraph (2) of this paragraph;

(ii) When through tickets or travel documents are issued in an exempt location indicating an arrival in the U.S. following a stopover (layover) in a location other than as specified in subparagraph (2)(i) of this paragraph; and

(iii) When passengers arrive in the U.S. in transit from a nonexempt location and are processed by Customs.

(4) *Collection of fees.* Carriers issuing tickets or travel documents on or after July 7, 1986, are responsible for the collection of the passenger processing fee from all passengers transported into the U.S. for whom the fee applies. The ticket or travel document shall be marked to indicate that the required fee has been collected from the passenger. If the ticket is not so marked and was issued in a foreign country, the fee shall be collected and remitted by the departing carrier upon departure of the passenger from the U.S. If collected at time of departure from the U.S., the carrier making the collection shall issue a receipt to the passenger. U.S.-based tour wholesalers who contract for passenger space and issue non-carrier tickets will collect and remit the processing fee to Customs in the same manner as the carrier.

(5) *Payment and quarterly statement procedures.* Payment must be made no later than 31 days after the close of the calendar quarter in which the fees are collected. If the issuing carrier has not collected the required fee from passengers, the person who first collects that fee shall remit it to Customs.

(i) Fee payments shall be accompanied by a statement which includes the following information:

(A) Name and address of the party remitting payment;

(B) Taxpayer Identification number of the party remitting payment; and

(C) Calendar quarter covered by the payment.

(ii) Fee payments shall be at the location and in accordance with the procedures specified in paragraph (i) of this section.

(6) Carriers contracting with a U.S.-based tour wholesaler are responsible for notifying Customs of all flights or voyages contracted, the number of spaces contracted for, and the name, address and taxpayer identification number of the tour wholesaler all within 31 days after the close of the calendar quarter in which such a flight or voyage occurred.

(7) *Maintenance of records.* Each airline and vessel company affected by this paragraph shall maintain all such documentation necessary for Customs to verify the accuracy of fee computations and to otherwise determine compliance under the law. Such documentation shall be maintained for a period of 2 years from the date of fee calculation. The affected companies shall advise the Director, National Finance Center, of the name, address, and telephone number of a responsible officer who shall be able to verify any records required to be maintained under this paragraph. The Director, National Finance Center, shall be promptly notified of any changes in the identifying information submitted. Required information shall be submitted as set forth in paragraph (i) of this section.

(8) *Limitation on charges.* Other than the $5 processing fee for arriving passengers specified in this paragraph, arriving scheduled airline flights as defined in § 6.1(f) of this Chapter and operating within the requirements of § 6.2 of this Chapter, shall be provided inspectional services for their passengers at no additional cost.

(h) *Annual customs broker fee.* Customs brokers are subject to an annual fee for each permit held by an individual, partnership, association, or corporate broker as specified in § 111.96 of this Chapter.

(i) *Fee remittance and information submission procedures.*

(1) *Fee remittance.* All fees required to be remitted pursuant to this section shall be payable by check or money order to the U.S. Customs Service, in the amounts prescribed in these regulations. Unless otherwise provided for in this section, all fee remittances required by this section shall be mailed to: U.S. Customs Service, P.O. Box 198151, Atlanta, Georgia 30384. Each payment shall be accompanied by information sufficient to identify the person or organization remitting the fee, a brief description of the type of fee being remitted (whether railroad, commercial airline passenger, or other), and the time period to which the payment applies.

(2) *Information submission.* Unless otherwise specified, all information, summaries, reports, or other data required to be submitted to Customs pursuant to this section shall be mailed to the Director, National Finance Center, Attn: Revenue Accounting, P.O. Box 68901, Indianapolis, Indiana 46278.

PART 111—CUSTOMS BROKERS

1. The authority citation for Part 111, Customs Regulations (19 CFR Part 111), is amended to read as set forth below. The statutory citations appearing elsewhere in Part 111 are removed.

AUTHORITY: 19 U.S.C. 66, 1202, (Gen. Hdnte. 11), 1624, 1641.

2. Part 111 is amended by creating a new subpart E and adding a new § 111.96, to read as follows:

SUBPART E—FEES

§ 111.96 Fees.

(a) [Reserved].

(b) [Reserved].

(c) *User Fee.* An annual user fee for $125 will be assessed for each permit held by an individual, parthership, association or corporate broker.

(1) The fee is payable for each calendar year in each district where a broker has a permit to do business. If a broker receives a permit at a time other than the beginning of a calendar year, the full $125 must be paid immediately. If a broker fails to pay the fee by January 1 of each year or immediately at the time he receives his permit, the district director will notify the broker in writing of his failure to pay and that the permit is revoked. The notice will constitute revocation of the permit.

(2) For calendar year 1986, brokers must remit payment of $125 by August 5, 1986, in each district where they have a permit to do business. If payment is not made by August 5, 1986, notice will be given and revocation will be effective August 5, 1986.

(d) [Reserved].

(e) *Payment of Fee.* All fees shall be paid by check or money order payable to the U.S. Customs Service.

CONFORMING AMENDMENTS

PARTS 4, 6, 123, AND 145, CUSTOMS REGULATIONS

To conform the Customs Regulations to the changes made by the amendments to Part 24, Customs Regulations (19 CFR Part 24), Parts 4, 6, 123, and 145, Customs Regulations (19 CFR Parts 4, 6, 123, and 145), are amended in the following manner:

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The authority citation for Part 4 continues to read as follows:

AUTHORITY: 5 U.S.C. 301; 19 U.S.C. 66, 1624; 46 U.S.C. 3, 2103.

2. Part 4 is revised by adding a new paragraph (i) to § 4.98 to read as follows:

§ 4.98 Navigation fees.

* * * * * * *

(i) Vessels, whether private or commercial, and passengers arriving in the customs territory of the U.S. aboard commercial vessels, may be subject to the payment of fees for services provided them as set forth in § 24.22 of this Chapter.

PART 6—AIR COMMERCE REGULATIONS

1. The authority citation for Part 6 continues to read as follows:

AUTHORITY: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (Gen. Hdnote 11), 1624; 49 U.S.C. 1474, 1509.

2. Part 6 is revised by adding a new § 6.1a to read as follows:

§ 6.1a Customs private aircraft and commercial passenger fees.

Private aircraft and passengers aboard commercial aircraft arriving in the customs territory of the U.S., may be subject to the payment of fees for services provided them as set forth in § 24.22 of this Chapter.

PART 123—CUSTOMS RELATIONS WITH CANADA AND MEXICO

1. The authority citation for Part 123 is revised to read as follows:

AUTHORITY: 19 U.S.C. 66, 1202 (Gen. Hdnote 11), 1624.

§ 123.1 also issued under 19 U.S.C. 1459;
§ 123.2 also issued under 19 U.S.C. 1460;
§ 123.3 also issued under 19 U.S.C. 1459;
§ 123.4 also issued under 19 U.S.C. 1484, 1498;
§ 123.7 also issued under 19 U.S.C. 1498;
§ 123.8 also issued under 19 U.S.C. 1448, 1450–1454, 1459;
§ 123.9 also issued under 19 U.S.C. 1460, 1584, 1618;
§ 123.11 also issued under 19 U.S.C. 1465;
§§ 123.12–123.18 also issued under 19 U.S.C. 1322;
§§ 123.21–123.23, 123.25–123.29, 123.41, 123.51 also issued under 19 U.S.C. 1554;
§ 123.24 also issued under 19 U.S.C. 1551;
§§ 123.31–123.34, 123.42, 123.52, 123.64 also issued under 19 U.S.C. 1553;
§ 123.63 also issued under 19 U.S.C. 1461, 1462;
§ 123.71 also issued under 19 U.S.C. 1595.

2. All other statutory authority cited at the end of the index and various sections in Part 123 is removed.

3. Part 123 is revised by adding a new § 123.1a to read as follows:

§ 123.1a Customs railroad car and commercial truck fees.

Each commercial truck, truck cab, and railroad car (except locomotives and cabooses), whether passenger or freight, whether empty or otherwise, which enters the customs territory of the U.S., is subject to the payment of fees for services provided them as set forth in § 24.22 of this Chapter.

PART 145—MAIL IMPORTATIONS

1. The authority citation for Part 145 continues to read as follows:

AUTHORITY: 19 U.S.C. 66, 1202 (Gen. Hdnote 11), 1624.

2. Part 145 is revised by adding a new § 145.1a to read as follows:

§ 145.1a Customs fees for certain dutiable mail entries.

Each item of dutiable mail for which Customs prepares documentation will be subject to the payment of a fee for services provided, as set forth in § 24.22 of this Chapter.

WILLIAM VON RAAB,
Commissioner of Customs.

Approved: June 4, 1986.
FRANCIS A. KEATING II,
Assistant Secretary of the Treasury.

[Published in the Federal Register, June 11, 1986 (51 FR 21152)]

(T.D. 86-110)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
May 5, 1986	$0.007278
May 6, 1986	.007168
May 7, 1986	.007235
May 8, 1986	007294
May 9, 1986	.007289
Israel shekel:	
May 5–9, 1986	N/A

South Korea won:	
May 5–8, 1986	.001125
May 9, 1986	.001126
Taiwan N.T. dollar:	
May 5–6, 1986	.025934
May 7, 1986	.025940
May 8, 1986	.025947
May 9, 1986	.025961

(LIQ-03-01 S:COM CIE)

Dated: May 9, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-111)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
May 12, 1986	$0.007342
May 13, 1986	.007233
May 14, 1986	.007267
May 15, 1986	.007273
May 16, 1986	.007207
Israel shekel:	
May 12–16, 1986	N/A
South Korea won:	
May 12, 1986	.001126
May 13, 1986	.001127
May 14–16, 1986	.001126
Taiwan N.T. dollar:	
May 12, 1986	.025981
May 13, 1986	.025994

May 14, 1986	.026001
May 15, 1986	.025867
May 16, 1986	.026028

(LIQ-03-01 S:COM CIE)

Dated: May 16, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-112)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Greece drachma:	
May 19, 1986	$0.007207
May 20, 1986	.007123
May 21, 1986	.007082
May 22, 1986	.007027
May 23, 1986	.006988
Israel shekel:	
May 19-23, 1986	N/A
South Korea won:	
May 19, 1986	.001125
May 20-23, 1986	.001124
Taiwan N.T. dollar:	
May 19, 1986	.026035
May 20, 1986	N/A
May 21, 1986	.026055
May 22, 1986	.026062
May 23, 1986	.026069

(LIQ-03-01 S:COM CIE)

Dated: May 23, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

155-619 O - 86 - 2

(T.D. 86-113)

Foreign Currencies—Daily Rates for Countries Not on Quarterly List

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

May 26, 1986, holiday.

Greece drachma:	
May 27, 1986	$0.006995
May 28, 1986	.007042
May 29, 1986	.006983
May 30, 1986	.006897
Israel shekel:	
May 27-30, 1986	N/A
South Korea won:	
May 27-30, 1986	.001122
Taiwan N.T. dollar:	
May 27, 1986	.026089
May 28, 1986	.026110
May 29, 1986	.026123
May 30, 1986	.026151

(LIQ-03-01 S:COM CIE)

Dated: May 30, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-77 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
May 5, 1986	.065232
May 6, 1986	.064267
May 7, 1986	.064412
May 8–9, 1986	.065232
Belgium franc:	
May 5, 1986	.022416
May 6, 1986	.022183
May 7, 1986	.022297
May 8, 1986	.022351
May 9, 1986	.022472
Denmark krone:	
May 5, 1986	.123824
May 6, 1986	.122279
May 7, 1986	.122888
May 8, 1986	.123946
May 9, 1986	.123793
Finland markka:	
May 5, 1986	.202347
May 7, 1986	.200904
May 8, 1986	.202634
May 9, 1986	.202163
Germany deutsche mark:	
May 5, 1986	.457143
May 6, 1986	.452940
May 7, 1986	.455270
May 8, 1986	.458716
May 9, 1986	.459137
Ireland pound:	
May 5, 1986	1.3950
May 6, 1986	1.3807
May 7, 1986	1.3835
May 8, 1986	1.3980
May 9, 1986	1.3958
Italy lira:	
May 5, 1986	.000667
May 6, 1986	.000660
May 7, 1986	.000663
May 8–9, 1986	.000668
Japan yen:	
May 5, 1986	.006038
May 6, 1986	.006015
May 7, 1986	.006057
May 8, 1986	.006112
May 9, 1986	.006160
Netherlands guilder:	
May 5, 1986	.405515
May 6, 1986	.401768

May 7, 1986	.404122
May 8, 1986	.407415
May 9, 1986	.407997
New Zealand dollar:	
May 5, 1986	.57950
May 6, 1986	.58130
May 7, 1986	.58330
May 8, 1986	.58450
May 9, 1986	.58920
Norway krone:	
May 5, 1986	.144238
Spain peseta:	
May 5, 1986	.007194
May 8, 1986	.007218
May 9, 1986	.007207
Sweden krona:	
May 8, 1986	.142552
Switzerland franc:	
May 5, 1986	.545852
May 6, 1986	.541712
May 7, 1986	.545703
May 8, 1986	.550964
May 9, 1986	.552486

(LIQ-03-01 S:COM CIE)

Dated: May 9, 1986.

ANGELA DEGAETANO,
Chief,
Customs Information Exchange.

(T.D. 86-115)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-77 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
May 12, 1986	$0.065370

May 13, 1986	.064641
May 14, 1986	.065030
May 15, 1986	.064704
May 16, 1986	.064309
Belgium franc:	
May 12, 1986	.022487
May 13, 1986	.022272
May 14, 1986	.022371
May 15, 1986	.022282
May 16, 1986	.022148
Denmark krone:	
May 12, 1986	.124224
May 13, 1986	.122850
May 14, 1986	.123510
May 15, 1986	.122963
May 16, 1986	.122041
Finland markka:	
May 12, 1986	.201613
Germany deutsche mark:	
May 12, 1986	.459982
May 13, 1986	.454959
May 14, 1986	.457771
May 15, 1986	.455166
May 16, 1986	.452284
Ireland pound:	
May 12, 1986	1.3985
May 13, 1986	1.3825
May 14, 1986	1.3910
May 15, 1986	1.3825
May 16, 1986	1.3745
Italy lira:	
May 12, 1986	.000670
May 13, 1986	.000663
May 14, 1986	.000665
May 15, 1986	.000663
May 16, 1986	.000659
Japan yen:	
May 12, 1986	.006205
May 13, 1986	.006135
May 14, 1986	.006124
May 15, 1986	.006112
May 16, 1986	.006046
Netherland guilder:	
May 12, 1986	.408330
May 13, 1986	.403796
May 14, 1986	.406091
May 15, 1986	.404089
May 16, 1986	.401606

New Zealand dollar:	
May 12, 1986	.58900
Spain peseta:	
May 12, 1986	.007228
Switzerland franc:	
May 12, 1986	.554170
May 13, 1986	.547645
May 14, 1986	.550206
May 15, 1986	.546747
May 16, 1986	.543036
United Kingdom pound:	
May 12, 1986	1.5460

(LIQ-03-01 S:COM CIE)

Dated: May 16, 1986.

ANGELA DEGAETANO,
Chief,
Custom Information Exchange.

(T.D. 86-116)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-77 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Austria schilling:	
May 19, 1986	$0.063888
Belgium franc:	
May 19, 1986	.022022
Germany deutsche mark:	
May 19, 1986	.449640
Ireland pound:	
May 19, 1986	1.3660
Japan yen:	
May 19, 1986	.005947
May 20, 1986	.005931
May 21, 1986	.005925
May 22, 1986	.005907

May 23, 1986	.005896
Nethereland guilder:	
May 19, 1986	.399074
Norway krone:	
May 22, 1986	.130073
May 23, 1986	.129702
Republic of South Africa rand:	
May 20, 1986	.44050
May 21, 1986	.44000
May 22, 1986	.43800
May 23, 1986	.44000

(LIQ-03-01 S:COM CIE)

Dated: May 23, 1986.

ANGELA DEGAETANO,
Chief,
Custom Information Exchange.

(T.D. 86-117)

Foreign Currencies—Variances From Quarterly Rate

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in Treasury Decision 86-77 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

May 26, 1986, holiday.	
Japan yen:	
May 27, 1986	$0.005910
May 28, 1986	.005917
Norway krone:	
May 27-28, 1986	.129955
May 29, 1986	.128883
May 30, 1986	.127551

Republic of South Africa rand:

May 27, 1986	.42950
May 28, 1986	.43000
May 29, 1986	.42950
May 30, 1986	.42350

(LIQ-03-01 S:COM CIE)

Dated: May 30, 1986.

ANGELA DEGAETANO,
Chief,
Custom Information Exchange.

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 86-555)

PERMAGRAIN PRODUCTS, INC., APPELLANT v. UNITED STATES, APPELLEE

Craig E. Ziegler, Montgomery, McCracken, Walker & Rhoads, of Philadelphia, Pennsylvania, argued for appellant.

Joseph I. Liebman, Attorney in Charge International Trade Field Office, Department of Justice, of New York, New York argued for appellee. With him on the brief were *Richard K. Willard*, Assistant Attorney General, *David M. Cohen*, Director and *Judith M. Barzilay*.

Appealed from: U.S. Court of International Trade.

Chief Judge RE.

(Appeal No. 86-555)

PERMAGRAIN PRODUCTS, INC., APPELLANT v. UNITED STATES, APPELLEE

(Decided June 4, 1986)

Before DAVIS and NIES, *Circuit Judges*, and SWYGERT,* *Senior Circuit Judge*.

NIES, *Circuit Judge*.

Permagrain Products, Inc. appeals from the final judgment of the United States Court of International Trade in Case No. 81-12-01644, entered September 4, 1985, which upheld the United States Customs Service's classification of the subject merchandise under item 202.60 of the Tariff Schedules of the United States (TSUS). We affirm.

OPINION

The imported merchandise was classified by Customs as "other hardwood flooring" under item 202.60 of the TSUS. Permagrain challenged that classification, contending that the merchandise was properly classifiable as "hardwood lumber, rough, dressed or

*Honorable Luther Merritt Swygert, U.S. Senior Circuit Judge for the Seventh Circuit, sitting by designation.

worked" under item 202.42 of the TSUS. The Court of International Trade, in a thorough opinion authored by Chief Judge Re, considered the extensive testimony and other evidence presented and held that Customs' classification of the merchandise under item 202.60 of the TSUS was correct. Having considered Permagrain's arguments presented in the appeal, we are unpersuaded that the Court of International Trade committed any errors of law, or that any of its findings are clearly erroneous. *See Daw Industries, Inc.* v. *United States.* 714 F.2d 1140, 1142 (Fed. Cir. 1983). We affirm on the basis of Chief Judge Re's opinion.

AFFIRMED

(Appeal No. 86-603)

UNITED STATES STEEL CORP., PLAINTIFF-APPELLANT *v.* UNITED STATES OF AMERICA AND THE U.S. DEPARTMENT OF COMMERCE, INTERNATIONAL TRADE ADMINISTRATION, DEFENDANTS-APPELLEES AND SSAB SVENSKT STALL AB, INTERVENOR-APPELLEE

J. Michael Jarboe, of Pittsburgh, Pennsylvania, argued for appellant. With him on the brief was *John J. Mangan.*

Platte B. Moring, III, Department of Justice, of Washington, D.C., argued for appellees. With him on the brief were *Richard K. Willard,* Assistant Attorney General, *David M. Cohen,* Director and *Velta A. Melnbrencis, Lynn G. Kamarck* and *Elizabeth K. Dorminey,* Import Administration, U.S. Department of Commerce, of counsel.

Louis H. Kurrelmeyer, Winthrop, Stimson, Putnam & Roberts, of Washington, D.C., argued for intervenor SSAB Svenskt Staal AB. With him on the brief was *Robert Reed Gray.*

Appealed from: U.S. Court of International Trade.

Judge RESTANI.

(Appeal No. 86-603)

UNITED STATES STEEL CORP., PLAINTIFF-APPELLANT *v.* UNITED STATES OF AMERICA AND THE UNITED STATES DEPARTMENT OF COMMERCE, INTERNATIONAL TRADE ADMINISTRATION, DEFENDANTS-APPELLEES, and SSAB SVENSKT STAAL AB, INTERVENOR-APPELLEE

Before MARKEY, *Chief Judge,* RICH and ARCHER, *Circuit Judges.*

ARCHER, *Circuit Judge.*

ORDER

At oral argument, Appellee, United States, suggested mootness because all of the entries of merchandise here involved have been liquidated. Appellant, United States Steel Corporation (U.S. Steel),

agreed this was true but argued that we should nevertheless decide this appeal. It contended that the short time frame would make judicial review of the action of the International Trade Administration (ITA) unavailable in this and similar circumstances where ITA has terminated a suspension order prior to the completion of a countervailing duty investigation.

U.S. Steel's assertion is not correct. Here, U.S. Steel did not appeal the denial of the preliminary injunction by the Court of International Trade, which it could have done pursuant to 28 U.S.C. § 1292(c)(1), nor did it seek a stay of the agency action pending appeal after the decision of that court. With these alternatives available, we must dismiss this appeal which would not redress the alleged injury of U.S. Steel because it could not reach the entries in question.

Accordingly, IT IS ORDERED that the appeal be dismissed.

Dated: May 23, 1986.

For the Court.

GLENN L. ARCHER, Jr.,
Circuit Judge.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

Paul P. Rao	Jane A. Restani
James L. Watson	Dominick L. DiCarlo
Gregory W. Carman	Thomas J. Aquilino, Jr.

Senior Judges

Morgan Ford

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 86-55)

NATIONAL CORN GROWERS ASSOCIATION, NEW ENERGY CO. OF INDIANA, ARCHER DANIELS MIDLAND CO., OHIO FARM BUREAU FEDERATION AND A.E. STALEY MANUFACTURING CO., PLAINTIFFS *v.* JAMES A. BAKER III, SECRETARY, UNITED STATES DEPARTMENT OF THE TREASURY, JOHN M. WALKER, JR., ASSISTANT SECRETARY, U.S. DEPARTMENT OF THE TREASURY, WILLIAM VON RAAB, COMMISSIONER, U.S. CUSTOMS SERVICE, AND UNITED STATES OF AMERICA, DEFENDANTS AND RAJ CHEMICALS, INC., CERTIFIED OIL CO. AND CITICORP INTERNATIONAL TRADING CO., INC., INTERVENOR-DEFENDANTS

Court No. 85-08-01151

OPINION

[Declaratory judgment and permanent injunction for plaintiffs Archer Daniels Midland Company and A.E. Staley Manufacturing Company; intervenor importers to remit unpaid duties.]

(Decided May 22, 1986)

Williams & Connolly (Aubrey M. Daniel III, Stephen L. Urbanczyk, Manley W. Roberts, Robert W. Hamilton and *William R. Murray, Jr.)* for the plaintiffs.

Richard K. Willard, Assistant Attorney General; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch (*Kenneth N. Wolf*) for the defendants.

McDermott, Will & Emery (*Charles R. Work, R. Sarah Compton, Kurt J. Olson, Jacqueline E. Zins, Daniel C. Beckhard* and *Carolyn K. Weeder*) for intervenor-defendant RAJ Chemicals, Inc.

Rogers & Wells (*Robert V. McIntyre* and *Roger A. Clark*) for intervenor-defendant Certified Oil Company.

Wilmer, Cutler & Pickering (*A. Douglas Melamed, Robert C. Cassidy, Jr.* and *Deborah M. Levy*) for intervenor-defendant Citicorp International Trading Company, Inc.

David L. Armstrong, Attorney General (*Frank F. Chuppe,* Assistant Deputy Attorney General) for The Commonwealth of Kentucky, as *amicus curiae.*

Mayer, Brown & Platt (*Charles S. Levy*) for American Farm Bureau Federation, as *amicus curiae,* and *Hamel & Park* (*Jerome P. Weiss*) for Illinois Agricultural Association, as *amicus curiae.*

D'Amico, Luedtke, Demarest & Golden (*William F. Demarest, Jr.* and *Lizbeth R. Levinson*) for Citgo Petroleum Corporation, as *amicus curiae.*

AQUILINO, *Judge:* The background of this case has been set forth in Judge Carman's opinion, 9 CIT ——, Slip Op. 85-98 (Sept. 20, 1985), as well as in opinions of this court [1] deciding various motions, and will be discussed hereinafter only as it relates to necessary findings of fact or conclusions of law.

The plaintiffs and the defendants specify the issues of law essentially as (1) whether the U.S. Customs Service had authority to permit importation of fuel ethanol from Brazil after August 2, 1985 without payment of the full duties prescribed in the Tariff Schedules of the United States and (2) whether Customs Service rulings permitting such importation were arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(1)(A).

I

The parties also agree that the actions of the defendants complained of are to be measured by the contents of the administrative record. However, the parties do not concur as to what that record entails. Their disagreement stems from defendants' failure to comply with the mandate of 28 U.S.C. § 2635(d)(1), which is:

> In any other civil action in the Court of International Trade in which judicial review is to proceed upon the basis of the record made before an agency, the agency shall, within forty days or within such other period of time as the court may specify, after the date of service of the summons and complaint upon the agency, transmit to the clerk of the court, as prescribed by its rules—
> (A) a copy of the contested determination and the findings or report upon which such determination was based;
> (B) a copy of any reported hearings or conferences conducted by the agency; and
> (C) any documents, comments, or other papers filed by the public, interested parties, or governments with respect to the agency's action.

The summons and complaint were served on August 29, 1985. In the absence of the record (or any application to extend the time for the filing thereof), this court in Slip Op. 85-105 granted plaintiffs' motion for certain discovery of the defendant officials on the authority of *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 420 (1971), *Texas Steel Company* v. *Donovan,* 93 F.R.D. 619 (N.D.Tex. 1982), *Exxon Corporation* v. *Department of Energy,* 91 F.R.D. 26, 32-46 (N.D.Tex. 1981), *Quincy Oil, Inc.* v. *Federal Energy Administration,* 468 F.Supp. 383 (D.Mass. 1979), and *Gulf Oil Corporation* v. Schlesinger, 465 F.Supp. 913, 916 (E.D.Pa. 1979). That discovery included production of documents, responses to interrogatories and presentment for depositions of Deputy Director John T.

[1] *See* 9 CIT ——, Slip Op. 85-105 (Oct. 9, 1985), and 9 CIT ——, 623 F.Supp. 1262 (Nov. 26, 1985), the latter cited hereinafter as "Slip Op. 85-119".

Roth and Director Harvey Brent Fox of the Classification and Value Division of the Customs Service.

The court scheduled trial of any outstanding issues of fact. Thereafter, counsel for the defendants filed with the Clerk documents claimed to comprise the administrative record. They also interposed on the eve of trial a motion for judgment on that record pursuant to CIT Rule 56.1 and moved for a stay until resolution of their dispositive motion.

The court denied a stay. The plaintiffs moved to supplement the record with documents, mostly obtained during the discovery, and with Roth and Fox deposition testimony; intervenor-defendant RAJ Chemicals, Inc. [hereinafter referred to as "RAJ"] submitted an *in limine* motion to limit the scope of review to the administrative record.[2]

That record was submitted by counsel for the defendants under cover of an affidavit of Mr. Roth wherein he is characterized as having been "involved directly in the decisions" [3] at issue in this case. The affidavit incorporates by reference and attaches a list of documents contained in defendants' response to plaintiffs' request to produce. The list has been marked to indicate which papers produced during discovery are not considered by the defendants to be part of their record and therefore were not filed.

Of those papers, plaintiffs' motion to supplement sought admission into evidence of Nos. 12, 59, 60, 71, 79, 105, 107, 116, 117, 120, 122, 123, 124, 125 and 127, as well as three documents[4] not on the government list. The motion stated that the Roth affidavit

> excludes a number of * * * documents that were before the agency at the time of the agency decisions, some of which documents were filed with the agency by the public or interested parties and some of which were prepared by the agency and help explain the decisionmaking process * * *. Since these documents come within the terms of Rule 72(a) and 28 U.S.C. §2635, they should be included in the Administrative Record.[5]

In addition to 28 U.S.C. §2635 quoted above, CIT Rule 72(a) provides that

> within 40 days after the service of the summons and complaint upon the agency, the agency shall file with the clerk of the court the items specified in paragraphs (1), (2) and (3) of this subdivision (a), if they exist, and the certified list specified in paragraph (4) of this subdivision (a), as part of the official record of the civil action.

[2] Plaintiffs' motion was denied from the bench as to the documents; the depositions were received. To the extent RAJ's motion implied opposition to any supplementation of the record as filed by the defendants, it was denied. *See* Tr. at 117-18.

[3] Affidavit of John T. Roth, paras, 3, 4, 5 and 6 (Dec. 2, 1985) [hereinafter cited as "Roth Affidavit"]. The plaintiffs marked this affidavit as their trial Exhibit 1.

[4] Marked for identification as plaintiffs' trial Exhibits 17, 18 and 19.

[5] Memorandum in Support of Plaintiffs' Motion to Supplement the Administrative Record and to Admit Deposition Testimony and Documents Explaining the Agency's Decision, p. 2.

155-619 O - 86 - 3

(1) A copy of the contested determination and the findings or report upon which such determination was based.

(2) A copy of any reported hearings or conferences conducted by the agency.

(3) Any documents, comments, or other papers filed by the public, interested parties, or governments with respect to the agency's action. The agency shall identify and file under seal any document, comment, or other information obtained on a confidential basis, including a nonconfidential description of the nature of such confidential document, comment or information.

(4) A certified list of all items specified in paragraphs (1), (2) and (3) of this subdivision (a).

For his part, Mr. Roth makes the point several times in his affidavit that he "expanded" [6] paragraph (1) of this rule to supply certain documents as part of the record and that he also included other documents which do "not come within the scope of Rule 72(a) (1), (2) or (3)." [7]

In view of this attitude, and of the dictates of the above-quoted rules of law, it is difficult to discern why a number of documents discovered by the plaintiffs and proffered to supplement the record were not included in the first place. For example, document 71 is a request dated June 27, 1985 for a ruling by the Customs Service as to the duty on fuel ethanol proposed to be imported from Brazil by Citicorp International Trading Company, Inc.[8] and document 79 is a reply thereto on July 15, 1985. Documents 122, 123, 124 and 125 are requests in May and June 1985 for Customs Service rulings on proposed importations of fuel ethanol by RAJ, Valley Green International Trading Corporation and Certified Oil Company.[9] Exhibit 19 is a letter dated July 18, 1985 from RAJ's counsel to Mr. Fox contending that the Service's rulings underlying this case "represent a clear and cogent interpretation of the relevant TSUS items and should not be revoked or modified". On the other hand, plaintiffs' position is much less tenable on other documents, *e.g.*, No. 12 (complaining *ex post facto* about the ruling revocations through *ex parte* procedures), No. 105 (Customs Service news bulletins after the fact) and Nos. 107 and 116 (attempts by Customs to explain its actions to Senator Robert Dole and then Secretary of Agriculture John R. Block, respectively).

Notwithstanding the varying degrees of apparent relevance of the foregoing documents, they are not part of the administrative record according to the Roth affidavit, *i.e.*, they were not before the decisionmaker at the time of decision. In the face of such a certifi-

[6] Roth Affidavit, para. 11, p. 4; para. 12; para. 13, p. 7; and para. 14, p. 8.

[7] *Id.*, para. 11, p. 5 and para. 13, p. 8.

[8] On November 26, 1985, the court granted the motion of this company [referred to hereinafter as "Citicorp"] to intervene in this action as a party defendant.

[9] On October 10, 1985, Certified Oil Company's motion to intervene as a party defendant was granted. On December 9th, its counsel served and filed a "Notice of Withdrawal" and since then has been absent from the case.A

cation, the court is not at liberty to hold otherwise simply on the grounds of production during discovery and relevance, which is all the plaintiffs show. *See generally San Luis Obispo Mothers for Peace* v. *NRC,* 751 F.2d 1287, 1323–29 (D.C. Cir. 1984), *vacated in part on another ground on reh'g en banc,* 760 F.2d 1320 (D.C. Cir. 1985); *Star-Kist Foods, Inc.* v. *United States,* 8 CIT 305, Slip Op. 84-130 (Dec. 6, 1984). The court therefore denied plaintiffs' motion as to the documents,[10] and, with the limited exception of Exhibit 2, none are relied on hereinafter.

The Administrative Procedure Act and 28 U.S.C. § 2640(d) contemplate the availability of a complete record. However, no record was filed in a timely manner, thereby necessitating the independent discovery, which itself gave rise to the format, if not the contents, of the decisionmaker's certification. His affidavit admits that there are no reported hearings or conferences conducted by the agency [11] within the meaning of 28 U.S.C. § 2635(d)(1)(B) and CIT Rule 72(a)(2). Furthermore, Mr. Roth's attempts to "expand" the record notwithstanding, the court is unable to conclude after careful review that it contains either findings or a report of the kind contemplated by subparagraphs (A) and (1) of the foregoing rules as a basis for the administrative actions contested herein.

It has been held that hearings and formal findings are not always necessary to make an administrative record whole. *E.g., Camp* v. *Pitts,* 411 U.S. 138, 140–41 (1973) (interpreting the National Bank Act, 12 U.S.C. § 26); *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. at 409 (interpreting the Department of Transportation Act, 49 U.S.C. § 1653(f), and the Federal-Aid Highway Act of 1968, 23 U.S.C. § 138). The Supreme Court recently stated in *Florida Power & Light Co.* v. *Lorion:*

> If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.[12]

Of course, at the time of plaintiffs' motion to supplement, the court was not in a position to determine the adequacy of the administrative record in view of its last-minute filing along with defendants' motion for judgment thereon. Moreover, contrary to an earlier suggestion by the court that liquidation be suspended pending expedited resolution of the issues raised,[13] the defendants (according to letters from their counsel dated November 27 and December 23, 1985) had liquidated two of the contested ethanol en-

---

[10] Marked for identification at trial as plaintiffs' Exhibits 2 through 19.

[11] *See* Roth Affidavit, paras. 11(2), 12(2), 13(3) and 14(2).

[12] 105 S.Ct. 1598, 1607 (1985). *See* 5 K. Davis, Administrative Law Treatise 29:22 at 439 (2d ed. 1984).

[13] *See* Slip Op. 85–119, 623 F.Supp. at 1271.

tries on November 15 and December 20, 1985, respectively.[14] These maneuvers effectively have made remand upon any determination of record inadequacy inappropriate.

As indicated above, in the absence of the record, the court had granted leave to take deposition(s) of the decisionmaker(s)[15] on the authority of *Citizens to Preserve Overton Park, Inc.,* v. *Volpe,* 401 U.S. at 420 (Where there are no formal findings, "it may be that the only way there can be effective judicial review is by examining the decisionmakers themselves"). *See Public Power Council* v. *Johnson,* 74 F.2d 791, 793–94 (9th Cir. 1982); *Environmental Defense Fund, Inc.* v. *Costle,* 657 F.2d 275, 285 (D.C. Cir. 1981); *Hurst* v. *United States Postal Service,* 586 F.2d 1197, 1200 n.6 (8th Cir. 1978). As the Supreme Court stated in *Camp* v. *Pitts,* 411 U.S. at 142–43:

> If * * * there was such a failure to explain administrative action as to frustrate effective judicial review, the remedy was * * * to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary.

Having granted this remedy under the rare circumstances indicated, it would indeed be anomalous and not in the interests of effective judicial review for the court now not to receive and consider the deposition testimony of the decisionmakers along with the documents which they thereafter claim constitute their record.

II

From the outset, the defendants challenged the standing of the plaintiffs to prosecute this case. That challenge was overruled by Judge Carman during hearing and determination of plaintiffs' original application for a preliminary injunction. *See* Slip Op. 85–98 at 4. Then, on further consideration of defendants' motion to dismiss the complaint, joined in by RAJ, this court, taking the allegations of the complaint as true for purposes of deciding the motion, denied dismissal on the ground of lack of standing. *See* Slip Op. 85–119, 623 F.Supp. at 1264–66. Finally, the trial itself focused on this issue.

The intervenor-defendants argue vigorously in their post-trial briefs that the plaintiffs failed to carry their burden of proof on the question. This position is not well-taken, however, as to two of the plaintiffs.

---

[14] A third letter dated January 14, 1986 states that another entry was liquidated on January 10th.

Finally, defendants' counsel sent a letter to the court dated April 10, 1986 and stating that Customs had notified its field offices on March 24 and 27, 1986 that suspension of liquidation of the four remaining, contested entries herein had been lifted as a result of final negative deteminations by the International Trade Commission as to dumping of, and countervailing duties on, Brazilian fuel ethanol. *Compare* note 37 *infra with* 51 Fed. Reg. 9538 (March 19, 1986).

[15] Presumably, the examinations were based upon the documents produced during discovery, both those claimed now to comprise the record and those sought by the plaintiffs to be added thereto.

A. *Standing of Plaintiff Archer Daniels Midland Company ("ADM")*

ADM, which is the largest domestic producer [16] of anhydrous ethyl alcohol or ethanol,[17] operates plants in Peoria and Decatur, Illinois and Cedar Rapids and Clinton, Iowa. *See* Tr. at 55. Almost all of this product is derived from corn,[18] with ADM attempting to sell the resultant fuel ethanol to petroleum marketers across the United States—from Minnesota to Florida to California.[19]

A document in the administrative record herein describes the status of fuel ethanol in this country as follows:

> United States fuel ethanol sales find their modern origins in the oil supply disruptions and price escalations associated with the Arab oil crisis of the 1970's and the tax subsidies (both Federal and State) that began in 1978. Fuel ethanol and certain other gasoline extenders were promoted to lessen the likelihood that United States consumers would be held hostage in the future. Although OPEC's threat has subsided and the rate of growth of gasoline demand has lessened, fuel ethanol demand has been sustained in the 1980's, and likely in the future, by domestic rather than foreign policy. The adoption of the catalytic converter in the Clean Air Act of 1970 effectively required that new automobiles sold in the United States burn unleaded gasoline. This resulted in both increased demand for such gasoline and for sources of non-lead octane enhancers.
>
> Fuel ethanol, in addition to being a gasoline extender, is a significant source of octane. Fuel ethanol supplies were encouraged by tax credits granted under the Windfall Profits Tax legislation of 1980. Thus, through public policy affecting both the demand side and the supply side, U.S. fuel ethanol sales (U.S. apparent consumption) have grown from under 10 million gallons in 1978 to over 531 million gallons per year in 1984 (of which 430 million were produced domestically). Continued growth in U.S. sales has been further assured by recent EPA rulings that require the lowering of the lead content of leaded gasoline production from 1.1 grams per gallon (gpg) to 0.5 gpg by July 1, 1985 and to 0.1 gpg by January, 1986. Based on the most recent estimates, that nevertheless predates [*sic*] the

---

[16] *See, e.g.*, transcript of deposition on December 10, 1985 of Edward A. Harjehausen [hereinafter cited as "Harjehausen Deposition"], pp. 112–14, 134–35.

[17] The intended use of this product is both as an "extender" and an octane "enhancer" of gasoline [*see, e.g., id.* at 148–49], ergo the vernacular "fuel ethanol" and "gasohol". This use, however, is not new:

> Ethyl alcohol has been used for many years as a motor fuel when blended with gasoline, particularly in Europe. From 5 to 20 percent anhydrous alcohol is used in commercial blends. Alcohol has an octane number of 99 and a higher heat of vaporization than gasoline, both of which are technologically desirable. Despite alcohol having only two-thirds the calorific value of gasoline, blends of up to about 15 percent alcohol provide slightly more power and lower fuel consumption than straight gasoline. This anomaly is explained on the basis of a higher fuel/air ratio for the alcohol blend. In countries that imposed compulsory mixing, gasoline/alcohol blends were not readily acceptable by the public. However, gasoline/alcohol/benzene blends were acceptable, as indicated by experience in France with a blend consisting of 75 percent gasoline, 15 percent alcohol, and 10 percent benzene.

Marks' Standard Handbook for Mechanical Engineers at 7–20 (8th ed. 1978). One witness estimated that in 1985 "5 to 7 percent of the gasoline in this country contain[ed] ethanol." Harjehausen Deposition, p. 130.

[18] The Peoria plant has also processed some rye, milo and corn screenings. *See* Harjehausen Deposition, p. 115.

[19] *See, e.g.*, Tr. at 58 and Harjehausen Deposition, pp. 70, 75, 163 and 165.

> EPA's lead reduction edict, fuel ethanol sales are expected to raise by 15 percent for the year 1986 to 678 million gallons.[20]

For years, there has been analysis of motorfuel use in the United States on a regional or PADD ("Petroleum Administration for Defense District") basis. Florida, for example, is in PADD-I, which experienced a 93 percent increase in fuel ethanol sales from January 1984 to January 1985.[21] California, which experienced "sharp declines" in ethanol sales for the same period,[22] is part of PADD-V.

For its part, ADM's sales in Florida for the first half of 1985 "averaged around 3 million gallons a month."[23] Sales for the second half of last year declined markedly.[24] More specifically, Citgo Petroleum Corporation[25] was an inportant customer of ADM during the first half of 1985 in Florida[26] and in other states. Indeed, ADM maintains a terminal for distribution of ethanol to Florida (and elsewhere) at Avondale, Louisiana. ADM's subsidiary American River Transportation Company chartered a large, ocean-going barge with a capacity of approximately 55,000 barrels at a rate of $4,200.00 per day "to improve [ADM's] service to [its] Florida customers,"[27] including Citgo, starting in April 1985.

Nevertheless, soon thereafter the barge was subchartered because ASM "couldn't get consistent business" for it in Florida.

---

[20] Record Document ("RD") 44 (Glassman-Oliver Economic Consultants, Inc., *The Effect of Additional Supplies of Fuel Ethanol on U.S. Producers and Consumers* at 3–4 (footnotes omitted)).

The final rule of the Environmental Protection Agency as to gasoline lead content is set forth at 50 Fed.Reg. 9386 *et seq.* (March 7, 1985). *See also* 50 Fed. Reg. 13,116 *et seq.* (April 2, 1985) banking of lead rights).

[21] *See* RD 44 (Alcohol Update, *Ethanol Blend Market Share Jumps in January* at 4).

[22] *Id.*

[23] Harjehausen Deposition, p. 194. *See* Tr. at 239, 250. Most of the evidence in this case was adduced under a protective order agreed to by the parties. The court respects the desirability of confidentiality and therefore refers herein only to specific data produced in confidence as is minimally necessary to make this opinion intelligible.

[24] *See* Harjehausen Deposition at 195; Tr. at 250.

[25] Referred to hereinafter as "Citgo". After the court had set this case down for trail, Citgo filed a motion for leave to intervene as a party defendant, stating, among other things:

> Citgo is a large independent refiner and major producer of gasohol and gasoline fuels. In conjunction with its parent company, the Southland Corporation, Citgo markets gasohol in twenty (20) states through Citgo and 7-Eleven branded outlets. Together, Southland and Citgo are one of the largest domestic marketers of gasohol in the nation with 1985 sales of gasohol estimated to exceed 800 million gallons * * *.
>
> During June and July 1985 respectively, Citgo entered into two contracts for the purchase of Brazilian ethanol from importer Southern Missouri Oil Company * * *. Southern Missouri was a recipient of a Custom Service letter ruling to the effect that the 60 cent per gallon duty imposed by item 901.50 of the * * * (TSUS) did not apply to certain alcohol mixtures. Subsequently, Southern Missouri received a letter from the Customs Service revoking the prior rulings. This revocation letter also contained at "grandfather" provision challenged by plaintiffs in this action. This grandfather provision permitted certain limited previously contracted quantities of alcohol mixtures classifiable under TSUS item 432.10 to enter the United States prior to 5:00 p.m. November 1, 1985 exempt from the 60 cent per gallon duty imposed on ethyl alcohol under item 901.50, TSUS.
>
> Pursuant to this provision, Southern Missouri entered two shipments of ethanol mixtures during the weekend of October 26–27, 1985 without liability for the 60 cent per gallon duty imposed by TSUS item 901.50. Once entered, the imported mixtures were immediately sold to Citgo. Citgo has agreed to indemnify Southern Missouri for certain increased duties for which Southern Missouri might become legally liable as a result of this lawsuit.

[26] *See* Tr. at 243. *Cf. id.* at 56–57.

[27] *Id.* at 242.

Memorandum in Support of Motion of Citgo Petroleum Corporation for Leave to Intervene, pp. 1–3.

At trial, the court denied this motion to intervene, whereupon Citgo moved for reconsideration, stating in its motion, among other things, that "Citgo is not a holder of a revoked letter ruling nor a holder of one of the grandfather rulings which are the subject of this litigation" and that "Citgo is not an importer of record". This later motion was denied in an order dated January 6, 1986, which also granted Citgo's motion to exclude from the case the transcript of plaintiffs' deposition on December 12, 1985 of the company's general manager of industrial products and special products.

Thereafter, the court granted Citgo's motion for leave to file a brief as *amicus curiae*.

ADM's vice-president of marketing, Edward A. Harjehausen, testified as follows as to the company's loss of business from Citgo:

Q. Did you sell product to Citgo after the month of May?
A. No, we didn't.
Q. Did you make effort to sell them product after the month of May?
A. Yes, we did.
Q. In what months did you make efforts to sell the product for use in Florida?
A. We offered to sell them product in June, July and in August.
Q. And did you sell them product?
A. No, we didn't sell them anything.
Q. Did you have an understanding as to why not?
A. Well, I am not sure why not. There was an indication that our pricing wasn't attractive. There was an indication that he didn't really need any. I cannot honestly say we pinned down a specific reason why.
Q. Did you quote a price?
A. Yes.
Q. Was the price different in any material respect from the price that you had been quoting in the previous months?
A. No.
Q. There was a change in the tax incentive in July in Florida, isn't that correct?
A. Yes there was.
Q. Did you change your price as a result of that change in the tax incentive.
A. No. We felt that the ethanol sold in Florida market prior to the tax change was undervalued, and that when the tax change came into play, we didn't feel that the overall economics warranted a price change, so we made no price change.
Q. Did the change in the Florida tax incentive change your desire to sell product in the State of Florida?
A. No.
Q. Did it change the volume that you wanted to sell or try to sell or desire to sell in Florida?
A. No.
Q. Did it change your price?
A. No.[28]

This testimony was adduced in rebuttal to that of Citicorp's expert witness,[29] who sought to analyze the economics of ADM's loss in Florida of some 1.5 million gallons [30] of ethanol sales per month during the last half of 1985. ADM has made a "conscious decision to sell less product in the Florida market" because it "did not want to run into head-to-head competition with ethanol-toluene

[28] *Id.* at 246–47.
[29] *See generally id.* at 143–92.
[30] *See, e.g., Id.* at 250; Harjehausen Deposition, pp. 194–95.

blends."[31] In essence, this witness, John G. Reilly, concluded that ADM's decision was "economically justifiable"[32] and "rational."[33] He sought to support this conclusion by projecting the profitability of a diversion of 1.5 million gallons of ethanol per month from Florida to Minnesota, Illinois and Kansas.[34]

However, Mr. Reilly did not know the average "net-back" to ADM from ethanol sales in Florida or in the other three states. *See* Tr. at 158. He admitted that whatever price differentials may have existed between the two areas had not "triggered any action"[35] on ADM's part to remove product from Florida at least up until June 1985. Mr. Reilly agreed that a basic economic principle or truism operating herein is that more supply in a given market will result in downward pressure on pricing,[36] and he also was aware that Citgo had purchased approximately 18.5 million gallons of fuel ethanol from Southern Missouri Oil Company[37] at a price substantially below that of ADM.[38] Finally, Mr. Reilly, who testified that for several months he had been conducting a study in connection with the ITC injury investigation of fuel ethanol from Brazil, conceded an awareness of continuing ADM sales in Florida, albeit not to its erstwhile most important customer, Citgo. *See id.* at 188.

In the face of such evidence of loss of business in the largest market for gasohol,[39] the intervenor-defendants cling to their position that ADM

> has failed to demonstrate that it has standing in this case because it has failed to demonstrate that it has been "injured in fact" by the Service's decision to grandfather a limited amount of mixtures.[40]

---

[31] Harjehausen Deposition, p. 91. *See also* Tr., p. 60. Mr. Harjehausen testified at trial that his company determined in September-October 1985 to reduce the amount of ethanol for sale in Florida. *See id.* at 64. Citicorp called Citgo's counsel to the stand who offered hearsay testimony to the effect that that decision had been reached in April. *See id.* at 193. This testimony was not corroborated by Citgo's manager of special fuels, Jack Woersching, under examination by counsel for Citicorp and for the plaintiffs. *See generally id.* at 328–34.

What the evidence shows, and the court finds, is that a meeting between Messrs. Harjehausen, Woersching and others took place on April 9, 1985 at which time a commitment was sought for the purchase from ADM of Citgo's "entire requirement in Florida" [*id.* at 339] for a period of six to twelve months. No such agreement was reached, and Citgo purchases of fuel ethanol from its "traditional supplier—ADM—[*id.* at 333] ceased soon thereafter.

[32] *Tr.* at 168.

[33] *Id.* at 172, 183.

[34] *Compare* Citicorp trial Exhibit 2 *with* Tr. at 149–54.

[35] Tr. at 163.

[36] *See id.* at 166, 170, 185.

[37] Hereinafter referred to as "Southern Missouri". This alcohol was landed in Louisiana in October 1985 from two ships, as shown in Slip Op. 85-119, 623 F.Supp. at 1270. As also shown in that opinion, 623 F.Supp. at 1269–70, liquidation of those entries was suspended per force of an ITA preliminary determination of likely sale in the United States at less than fair value. *See also* plaintiffs' trial Exhibit 20 (USITC Pub. No. 1678 (preliminary ITC determination that "there is reasonable indication that an industry in the United States is threatened with material injury by reason of imports from Brazil of certain ethyl alcohol") (April 1985)).

[38] *See* Tr. at 168 and *compare id. and id.* at 169–70, 171 185 *with id.*, at 261. Citgo's manager special fuels estimated that this supply of ethanol would fulfill the company's needs in Florida until the end of March 1986. *See id.* at 319.

[39] *See* Tr. at 305–06.

[40] Intervenor-Defendant RAJ Chemicals, Inc.'s Post-Trial Brief and Memorandum in Support of Motion for Judgment on the Record [hereinafter cited as "RAJ Post-Trial Brief"], p. 24. *See also* Trial Brief of Citicorp, pp. 64–67.

In *Allen* v. *Wright*, 104 S.Ct. 3315, 3325 (1984), the Supreme Court stated that

> the constitutional component of standing doctrine incorporates concepts concededly not susceptible of precise definition. The injury alleged must be, for example, "'distinct and palpable,'" *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979) (quoting *Warth* v. *Seldin, supra*, at 501), and not "abstract" or "conjectural" or "hypothetical," *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101–02 (1983); *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974). The injury must be "fairly" traceable to the challenged action, and relief from the injury must be "likely" to follow from a favorable decision. See *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S., at 38, 41. These terms cannot be defined so as to make application of the constitutional standing requirement a mechanical exercise.

Years earlier, a government claim of lack of standing on the part of Students Challenging Regulatory Agency Procedure, suing under the APA, 5 U.S.C. §702, to enjoin ICC orders permitting railroad rate increases had been rejected by the Court as follows:

> The Government urges us to limit standing to those who have been "significantly" affected by agency action. But, even if we could begin to define what such a test would mean, we think it fundamentally misconceived. "Injury in fact" reflects the statutory requirement that a person be "adversely affected" or "aggrieved," and it serves to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem. We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, see *Baker* v. *Carr*, 369 U.S. 186; a $5 fine and costs, see *McGowan* v. *Maryland*, 366 U.S. 420; and a $1.50 poll tax, *Harper* v. *Virginia Bd. of Elections*, 383 U.S. 663. While these cases were not dealing specifically with §10 of the APA, we see no reason to adopt a more restrictive interpretation of "adversely affected" or "aggrieved." As Professor Davis has put it: "The basic idea that comes out in numerous cases is that an identifiable trifle is enough for standing to fight out a question of principle; the trifle is the basis for standing and the principle supplies the motivation." Davis, Standing: Taxpayers and Others, 35 U. Chi. L. Rev. 601, 613. See also K. Davis, Administrative Law Treatise §§22.09–5, 22.09–6 (Supp. 1970)[41]

RAJ's emphasis on ADM's size and market share is misplaced,[42] just as is Citicorp's theory that ADM profited by determining to sell elsewhere the product it could not market in Florida.[43] Indeed, as shown in the analysis of the ethanol market in California *infra*, ADM's size and concomitant ability to deliver its product anywhere

---

[41] *United States* v. *SCRAP*, 412 U.S. 669, 689 n. 14 (1973).
[42] *See* RAJ Post-Trial Brief, pp. 24–25.
[43] *See* Trial Brief of Citicorp, p. 66.

in the United States support, rather than undermine, its standing. As for the ADM sales in Minnesota and elsewhere in PADD-II, plaintiffs' expert witness testified:

> My opinion is that the facts presented today by Mr. Reilly have no bearing on whether or not there was harm to ADM as a result of an influx of Brazilian Ethanol into Florida. Tr. at 215.

Further:

> There is no question in economic theory or in what evidence I have seen admitted that there was harmful effect because of the influx of Brazilian ethanol into the Florida market on ADM and other marketers in that area. *Id.* at 216.
>
> * * * * * * *
>
> Whatever the conditions are in Florida, if you bring in additional supply, whatever they were before, if an additional supply comes in, standard economic analysis tells you the price of ethanol will fall * * *. Anybody in Florida holding ethanol at the time of the increased availability and the subsequent reduction of price will suffer harm. *Id.* at 217.

The court agrees with this analysis. The record herein amply shows, and the court so finds, that ADM suffered injury in the Florida market sufficient to prosecute this case to judgment. The test, as the Supreme Court indicated in *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982), is the existence of "an *injury* of *any* kind, economic or otherwise". 454 U.S. at 486 (emphasis in original).

If economics is "an inexact science in which emotions play a big role,"[44] then a loss of good will in Florida might alone be enough to satisfy the injury-of-any-kind test. But much more has been proven here. In addition to the loss of the 1.5 million gallons of business a month discussed above, the evidence also shows, and the court finds, that ADM ended 1985 with higher inventories of ethanol and fewer customers.[45]

The intervenor-defendants emphasize the deposition testimony, read into the record at trial, of the president of the Ethanol Corporation,[46] James Bruce Smith, that the fuel ethanol market "had al-

---

[44] P. Samuelson, Economics, An Introductory Analysis, p. 9 (3d ed. 1955). Indeed, Mr. Harjehausen testified that ADM is able to sell in the ethanol market place at prices higher than those of its competition. *See* Tr. at 251.

[45] *See* Harjehausen Deposition, pp. 155, 159.

[46] This company has been a customer of both ADM and plaintiff A.E. Staley Manufacturing Company [hereinafter referred to as "A.E. Staley" or "Staley"] in the Florida market and elsewhere in PADD-I.

At the close of his presentation on January 6, 1986, Citicorp's counsel moved, to the extent necessary, the admission into evidence of testimony on plaintiffs' application for a preliminary injunction on September 13, 1985, which included that of an expert, Donald L. Martin, who had been called by RAJ.

In calling Mr. Smith as a rebuttal witness at trial, plaintiffs' counsel announced that Mr. Smith would rebut the testimony of Mr. Martin [Tr. at 262], primarily in regard to the fuel ethanol market in North Carolina. Counsel for RAJ and Citicorp both objected that this proffer was not proper rebuttal, and the court sustained the objection in view of CIT Rule 65(a)(2) and the trial record before it. The court reserved judgment on the objections of both intervenor-defendants to plaintiffs' offer of Exhibit 23 into evidence. *See* Tr. at 280–84.

Continued

ready been slaughtered in Florida before ET got there."[47] He attributed this to three factors—increased competition, bad publicity, and the reduced state tax exemption, with the competition characterized as the biggest factor. *See* Tr. at 296–98. Indeed, on August 5, 1983, the Caribbean Basin Economic Recovery Act, 19 U.S.C. § 2701 *et seq.*, became law. Section 2701 empowers the President to "proclaim duty-free treatment for all eligible articles from any beneficiary country" in that geographic region. *Cf.* 19 U.S.C. § 2702(b). Apparently pursuant to this authority, Customs has twice ruled that fuel ethanol from the area can enter this country, including Florida, duty free.[48] In any event, Mr. Smith testified that a principal competitor was marketing ethanol which had entered entirely duty free, as well as at the five percent *ad valorem* rate at issue herein. *Cf.* Tr. at 298–99. In other words, the biggest cause of the "slaughter" of the Florida market was fuel ethanol not subjected to the surcharge (now 60 cents) prescribed by item 901.50, TSUS.

The defendants and RAJ argued in support of their original motions to dismiss that this case was moot, and intervenor-defendants' position now is also based on timing. That is, even if the determinations of the Customs Service to permit entry of Caribbean and Brazilian fuel ethanol without payment of the surcharge killed the market for the domestic product in Florida, that destruction has occurred prior to the Service's August actions complained of herein.

This position has some merit, but not enough to justify the relief requested by the defense because the court finds that the harm to ADM in Florida, which before Agust 1985, has continued well beyond that time. For example, Citgo's manager of special fuels estimated at trial that he had enough of the Brazilian product to satisfy his company's entire need for fuel ethanol in Florida for a number of months. *See* Tr. at 319. In fact, the residue of the two

---

That document, which is a letter from Mr. Smith to Mr. Harjehausen dated August 16, 1985 and discussing the ethanol market in North Carolina, apparently had been an attachment to an affidavit of Mr. Smith dated September 11, 1985 [plaintiffs' Exhibit Z] which he had brought to New York in anticipation of testifying in open court on September 13th. Mr. Smith did not testify, nor were the affidavit and letter received in evidence by the court. *See* transcript of proceedings on Sept. 13, 1985 [hereinafter cited as "Sept. 13 Tr."], p. 164. Futhermore, while Mr. Martin, during his testimony, made mention of North Carolina several times, that state's situation was hardly central to his thesis of absence of irreparable harm based on a continental United States market. *See generally id.* at 132–55.

Post-trial briefs for both sides continue the argument on admissibility of this document. The court points out in response to this argument that, while its rulings from the bench as to the scope of Mr. Smith's rebuttal testimony must stand and intervenor-defendants' objections to admission of Exhibit 23 therefore must be sustained, that letter is part of the administrative record herein. *See* RD 88.

Also at the close of his case on January 6th, Citicorp's counsel offered into evidence excerpts of the transcripts of the depositions of one Alfred C. Kellogg on December 12 and Gary Towne on December 13, 1985. The plaintiffs objected at that time, and they object now, to these proffers. The objection as to Mr. Towne, who is not an officer, director or managing agent of A.E. Staley within the meaning of CIT Rule 30(b)(4) (or Rule 32(a)(4)) and who appeared for deposition pursuant to a notice thereof specifically naming him, was sustained by the court from the bench. *See* Tr. at 198. That ruling stands.

As for Mr. Kellogg, who is counsel to Citicorp's Global Trade Division in New York City, there was and is no showing that he meets any of the conditions of CIT Rule 32(a)(3), hence plaintiffs' objection is hereby sustained, and no part of either his deposition transcript of Mr. Towne's transcript is otherwise referred to or relied on by the court in this opinion.

[47] Tr. at 291. The reference "ET" is to ethanol toluene, the primary fuel ethanol mixture at issue in this case.

[48] *See* 50 Fed. Reg. 14250–51 (April 11, 1985). *Cf.* Presidential Proclamation 5452 of March 31, 1986 to "Withdraw Preferential Treatment Under the Generalized System of Preferences for Certain Ethanol Mixtures", 51 Fed. Reg. 11539 *et seq.*, (April 4, 1986).

Southern Missouri shipments has been stored in Louisiana, with Citgo using the same oceangoing barge earlier chartered and then released by ADM for the transport of this Brazilian alcohol to Florida.[49] Furthermore, the April 10, 1986 letter from defendants' councel indicated that the duties on those two entries, as well as on the once-suspended Citicorp entries, have yet to be liquidated.

In denying the motions to dismiss on the ground of mootness in Slip Op. 85–119, the court, without the benefit of a timely-filed administrative record or the evidence thereafter adduced at trial, relied on the "capable-of-repetition, yet-evading-review" doctrine as set forth in *Weinstein* v. *Bradford,* 423 U.S. 147, 149 (1975), and other cases. The first requisite element had already been met by the date of that opinion, to wit, the challenged action of the Customs Service was too short in its duration (90 days) to be fully litigated prior to its expiration. With regard to the second requirement (existence of "a reasonable expectation that the same complaining party would be subjected to the same action again"), the court was unable to conclude then that such an expectation was out of the question.

Having now reviewed the agency record, as well as the evidence on plaintiffs' standing, the court concluded not only that such a reasonable expectation continues to exist but also that there has been no abatement in the controversies between the plaintiffs and defendants over the Customs Service's authority not to liquidate any unliquidated fuel ethanol entries herein at the rate prescribed by item 901.50, TSUS and between the plaintiffs and intervenor-defendants as to the importers' obligations to remit the unpaid duties.

As shown in Slip Op. 85–119, 623 F.Supp. at 1270, RAJ imported some 7.03 million gallons of fuel ethanol into the California market in September 1985. Its counsel characterizes ADM's claim of injury in that market as a result of this shipment as "pure nonsense" on the ground that "ADM abandoned the California market in May 1985".[50] This characterization misses the mark, however.

The evidence shows, and the court finds, that ADM sold sizeable quantities of fuel ethanol in California in April and May 1985. *See* Tr. at 62. ADM sold additional product in California in December 1985. *See id.* ADM's vice-president of marketing testified to continuing "talk * * * to customers around the country,"[51] one of which had been RAJ's September California customer, Beacon Oil Company[52], and he testified at trial that ADM's sales efforts were not limited to any particular geographic area of the United States. *See* Tr. at 55. In short, the court finds that ADM did not "abandon"

---

[49] *Compare* Tr. at 239 with *id.* at 318. By comparision, ADM has continued to make available (and sell) ethanol to Citgo in other markets. *See* Harjehausen Deposition, p. 194.

[50] RAJ Reply Brief, p.7.

[51] Harjehausen Deposition, p. 163.

[52] *Compare Tr.* at 132 (RAJ "had not sold any product to Beacon in the past") *with* Harjehausen Depostion, p. 168.

the California market in 1985, notwithstanding the "sharp declines" in overall ethanol sales at the start of the year noted in the RAJ record document quoted above, page 14, nor does the record support a finding that ADM was incapable of delivering product to Beacon in September 1985. What the record does show is that RAJ's sale price to Beacon then was significantly lower than ADM's sale prices before and after September to its other California customer[53], which itself was the recipient of a RAJ commission on the sale to Beacon. *See id.* at 132. To imply that this price differential, based in part on the contested 5% *ad valorem* duty[54], could not and did not harm ADM in such a way as to confer standing to prosecute this case is to turn both economics and the law askance.

B. *Standing of Plaintiff A.E. Staley*

The defense claims of lack of standing on the part of plaintiff A.E. Staley are also unpersuasive. This company produces annually millions of gallons of fuel ethanol and attempts to market its product, as well as that acquired from others, in PADD–I, including Florida and North Carolina.

Staley's vice-president and general manager of its ethanol business unit, W. Robert Schwandt, testified, and this court finds, that entry of fuel ethanol into PADD–I in 1985 without payment of the duty prescribed by item 901.50, TSUS resulted in an absolute loss of business on the part of the company. *See* Sept. 13 Tr., p. 85. *See also id.* at 87. Indeed, in North Carolina, Staley's sales droppped by more than 90 percent from June to July, and they have remained at a low level since then[55] due to an inability to compete with "non-duty paid alcohol."[56] The company's offer price in that state during the late autumn, 1985 was some 30 cents per gallon higher than that offered by others.[57]

Staley considers Florida to be "very important". Schwandt Deposition, p. 77. In June–July 1985, its sales of fuel ethanol there exceeded a million gallons. *See id.* at 75, 77. By the time of the trial, monthly sales in that state had also suffered "severe deterioration" due to "much lower price elsewhere." Tr. at 45.

As with ADM *supra,* the intervenor-defendants argue that Staley's lost business is not sufficient to confer standing. Both RAJ and Citicorp contend again that whatever harm Staley suffered in 1985 occurred prior to the "grandfathered imports in September and October". Reply Brief of Citicorp, p. 26. While the court agrees that the harm to Staley began before those particular entries, the court also finds that those Citicorp entries into PADD–I added to that harm thereafter. Not only had Staley's sales in North Caroli-

[53] *Compare* Tr. at 133 *with id.* at 62, 63.

[54] *Cf.* Tr. at 133.

[55] *Compare Tr. at 44 with id.* at 45, 49. At the time of trial, the company's sales in North Carolina in December were none. *See id.* at 49.

[56] Sept. 13 Tr., p. 92. *Cf.* transcript of deposition on December 13, 1985 of W. Robert Schwandt [hereinafter cited as "Schwandt Deposition"]. p. 62.

[57] *Compare* Tr. at 45 *and* Schwandt Deposition, p. 80 *with* Tr. at 287.

na fallen towards zero by the time trial began in December,[58] but Mr. Schwandt earlier had described one aspect of this harm as follows:

> Q. * * * Does the importation of ethanol toluene blends into PAD [*sic*] I constitute a viable threat of serious harm to A.E. Staley that could not be undone?
>
> A. Yes
>
> Judge Carman: How?
>
> [A] It has already specifically caused us to lose business and the margin attached to that business. We can't recover that. Furthermore, it has raised a question of credibility in the minds of our customers to what is the real cost and value of this product. So, when we go back, if we get an opportunity to go back, our job will be more difficult.
>
> Judge Carman: So, its [*sic*] a potential of loss of goodwill with customers and the loss of revenue that gives you the irreparable harm?
>
> [A] Yes.[59]

As indicated in Section A above, such a negative turning of customers might alone be enough to satisfy the standing standard enunciated in *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.,* 454 U.S. at 486

The intervenor-defendants also point to the fact that Staley's manufacture of fuel ethanol has not been diminished. *See, e.g.,* Tr. at 46. Indeed, the evidence indicates injury to the "merchandise side" of the business. *Id.* That is, the company's lost sales have been of product produced by others (and sought to be marketed by Staley) rather than by its own Tennessee plant. RAJ's argument, for example, is that

> the interest asserted by Staley in this litigation—that of a merchandiser of ethanol from foreign and domestic sources—is not within the zone of interest protected or regulated by the relevant statuts * * *. For that reason alone, Staley does not have standing to pursue this action and its claims for relief should be denied.[60]

The relevant statute implied is item 901.50, TSUS. The brief of Citgo, as *amicus curiae,* argues at page 9 that this tariff was not designed to protect the domestic ethanol industry, that is,"[i]t is a revenue measure pure and simple." *Id.,* p. 8. RAJ's Post-Trial Brief, on the other hand, states (at pages 32–33):

---

[58] *See* Tr. at 49. The intervenor-defendants attempt to attribute this dearth of sales to North Carolina's elimination of its state tax incentive. There can be little doubt that this changed circumstance had a negative impact on fuel ethanol sales in the state [*cf. id.* at 44 and Plaintiffs' Post-Trial Briefs, p. 20], but the EPA rule on gasoline lead content referred to above, page 13 and n. 20, assures ethanol of a role as a substitute octane enhancer in North Carolina, as elsewhere, and it is this market, at a minimum, which Staley is still attempting to compete in [*see* Schwandt Deposition, pp. 80–81]—without much success due to customer expectations of cheaper imports.

[59] Sept. 13 Tr., pp. 87–88.

[60] RAJ Reply Brief, p.13.

> The additional duty in item 901.50 TSUS offsets certain tax benefits that accure from the use of ethanol in motor fuel. (*See* 26 U.S.C. §§ 40; 4081) and in effect eliminates these benefits in the case of imported fuel ethanol. *See* 126 Conf. Rec. S.31709 (December 3, 1980) (statement of Senator Bellman); 126 Cong. Rec. H.11691 (December 3, 1980) (Statement of Representative Ullman). In turn, the tax benefits arising from the use of ethanol in motor fuel are designed to encourage the domestic production of this alternative to petroleum-based fuels. *See* Senate Rep. No. 905–529, 95th Cong., 2d Sess. 45, *reprinted in* 1978 U.S. CODE CONG & AD. NEWS 7981. Thus, item 901.50, TSUS, coupled with the tax subsidies provided in 26 U.S.C. §§ 40, 4081, affords a competitive price advantage to domestically produced ethanol and as such protects domestic producers of fuel grade ethanol by assuring that only domestically produced product benefits fully from the federal tax incentives. *See also* 126 Cong. Rec. S.153147 (December 3, 1980) (statement of Senator Dole).

The RAJ analysis is sounder on the intent and effect of the tariff,[61] but it is not enough to support the proposed conclusion that Staley's injury is outside the zone of interest to be protected. While the evidence indicates that Staley itself has sought to sell imported Brazilian ethanol,[62] that evidence also shows, and the court finds, that this plaintiff purchased millions of gallons of domestically-produced fuel ethanol for resale in North Carolina, Florida and elsewhere in 1985, including during the time of the entries disputed herein. *See generally* Schwandt Deposition, pp. 32–34.

From the outset of this case, RAJ has sided with the defendants in their position that the plaintiffs were required to protest pursuant to 19 U.S.C. § 1516. This position was overruled in Slip. Op. 85–119, but it is useful to note that that section of the Tariff Act itself confers standing on merchandisers such as Staley. Furthermore, the plaintiffs were not required to pursue such a protest because of the nature of the controversy herein and the relief requested, including a declaratory judgment. When this relief is requested, the Supreme Court has stated:

> * * * Basically, the question in each case is whether the facts alleged, under all circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.[63]

The facts adduced in this case show, and the court concludes, the plaintiff A.E. Staley Manufacturing Company meets the standing requirements.

---

[61] The courlt notes in passing that, while the revenues raised by the tariff are no doubt sizeable (at least when the Customs Service deigns to enforce it), import duties have long ceased cnstituting a primary source of revenue for the treasury of the United States.

[62] *See* Schwandt Deposition, p. 32.

[63] *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941), cited with continued approval in *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 102 (1983).

C. *Lack of Standing of Other Plaintiffs.*

Plaintiffs' complaint on its face was sufficient to withstand a motion to dismiss. However, as the Court noted in *Gladstone, Realtors* v. *Village of Bellwood,* 441 U.S. 91, 115 n. 31 (1979):

> Although standing generally is a matter dealt with at the earliest stages of litigation, usually on the pleadings, it sometimes remains to be seen whether the factual allegations of the complaint necessary for standing will be supported adequately by the evidence adduced at trial.

Plaintiffs; proof is inadequate to support standing now on the part of the National Corn Growers Association, New Energy Company of Indiana and the Ohio Farm Bureau Federation, Inc. Indeed, at trial counsel entered a stipulation to the effect that the New Energy Company does not now sell, nor has it ever sold, fuel ethanol in either PADD-I or California and that it is

> unable to identify in any way in which it has been injured by the importation of 44 million gallons of ethanol toluene blends during the 90 day grandfather period at issue in this case. Tr. at 102.

As for the Ohio Farm Bureau Federation, Inc., the evidence shows that it is a trade representative of some 90,000 people and that it owns Ohio Farm Bureau Synfuels, Inc., which has a 20 percent interest in South Point Ethanol, a producer of fuel ethanol from corn.

South Point considers the State of Maryland an "attractive" potential market in veiw of its proximity to the company's plant. *See* Tr. at 85. It sold some ethanol in that state in 1985,[64] and it determined to attempt to market larger quantities there. To this end, a sizeable storage tank and some rail cars were leased for a year. But these steps were taken without any contractual commitment to purchase South Point's ethanol. *See id.* at 84. And there was testimony to the effect that it is "almost impossible" [65] to blend gasohol in Maryland due to "volatility standards". *See id.* at 126. In other words, South Point, which was selling elsewhere all the ethanol it produced anyway,[66] was looking to engender "new demand" in that state. *See* Tr. at 84. The hoped-for customer had been working with RAJ in an attempt to develop an appropriate gasohol blend for Maryland. But RAJ had not sold fuel ethanol to that company,[67] thereby leaving plaintiffs' counsel to contend now that the RAJ entry in California without payment of the item 901.50 duty enables RAJ to "compete more agressively" in Maryland. Plaintiffs' Post-Trial Brief, p. 31, n. 30. If the best proof of such aggressiveness is price, injury to the Ohio Farm Bureau Federation, Inc.

---

[64] *See* Tr. at 80.
[65] *Id.* at 127.
[66] *See id.* at 84.
[67] *See id.* at 126, 128.

has not been established since South Point's proposed ethanol price was but a penny more a gallon than that of RAJ,[68] which differential evaporates with the South Point testimony that the hoped-for customer prefers domestically-produced ethanol. *See* Tr. at 75.

In sum, the evidence fails to substantiate standing on the part of plaintiff Ohio Farm Bureau Federation, Inc., and the same is true for plaintiff National Corn Growers Association.

This latter organization was characterized at trial as a "non-profit, non-partisan association designed to benefit and represent the corn growers of this country on issues of importance to them". *Id.* at 88. It has some 17,000 members and 19 supporting members, including ADM and A.E Staley.[69] The testimony of its witness, however, failed to prove injury either to itself or to its corn-growing members caused by the actions of the defendants complained of herein. Rather, the evidence simply reflects a generalized concern for the continued expansion of domestic production of ethanol derived from home-grown corn. *See id.* at 88–95.

The Supreme Court has held that a trade association like that of the corn growers does have standing to bring suit on behalf of its members when:

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germaine to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Hunt v. *Washington State Apple Advertising Commission,* 432 U.S. 333, 343 (1977). Earlier, in *Warth* v. *Seldin,* 422 U.S. 490, 511 (1975), the Court had pointed out that "[e]ven in the absence of injury to itself, an association may have standing solely as the representative of its members." However, proof of harm to one or more of those individual members is required to justify any relief. *See* 422 U.S. at 515.

That proof of harm to individual growers of corn has not been adduced here,[70] that is, there is no showing that *Hunt* condition (a), *supra,* is met. Rather, plaintiffs' counsel argue now that the Association has standing based on the injury to non-voting, "supporting members" ADM and A.E. Staley. But neither of these corporations is a corn grower, nor are their interests necessarily coincident with those of American corn farmers. For example, ethanol can be, and is, derived from other grains. And those raw materials are also subject to importation. In short, the court is unable to conclude that the proven harm to ADM and A.F. Staley is sufficient to sus-

[68] *Compare id.* at 75 *with* transcript of deposition on December 13, 1985 of RAJ president Maulik Radia [hereinafter cited as "Radia Deposition"], p. 35.

[69] Such supporting members, however, do not have a vote, nor are they eligible to be directors of the association. Rather, they pay dues and provide financial and other assistance to the organization. *See* Tr. at 99–100.

[70] The administrative record contains a letter to Mr. Fox from the Association dated August 16, 1985 [RD 10] which attempts to quantify the harm to U.S. corn farmers to be caused by two of the contested Brazilian shipments, albeit in a general way and based upon a number of unsubstantiated assumptions.

155 619 O - 86 - 4

tain the continued presence in this case of plaintiff National Corn Growers Association simply on the ground of payment of dues. *cf. Health Research Group* v. *Kennedy,* 82 F.R.D. 21, 27–28 (D.D.C. 1979).

III

The defendants argue in their post-trial brief that the plaintiffs have not shown that whatever injury in fact they suffered was caused by the activities of the Customs Service. This argument is not well-taken; the court finds that injury to plaintiffs ADM and A.E. Staley described above fairly can be traced to defendants' determinations to permit more than 40 million gallons of fuel ethanol from Brazil to enter the United States during September and October 1985 for distribution and sale in PADD–I and California without payment of the duties prescribed by item 901.50, TSUS.[71]

Of course, in their motion for judgment on the agency record, submitted on the eve of trial, the defendants contend that their actions "were lawfully done", to quote from page 4 of their memorandum of law. However, just as the facts do not support the thesis of defendants' post-trial brief, neither does the law support their pretrial position. Indeed, the best indicator of this is their own determination reached by August 1985 that they had been wrong to "impl[y to RAJ, Citicorp and other importers] that the duty of 60 cents per gallon provided for in item 901.50, TSUS, would not apply." [72] That is, to quote further from this revocation letter to RAJ:

> Upon review of this matter we conclude that the 60 cents per gallon duty should be applied to the ethyl alcohol component of this mixture when the mixture is imported for fuel use, *inasmuch as the language of item 901.50 encompasses all ethyl alcohol, provided for in item 427.88, which is imported for fuel use, whether it is imported by itself or in a mixture.* RD 16 (emphasis added).

The administrative record contains a lengthy document [RD 114] prepared by The Brazilian Ethanol Producers' Special Committee on the export potential of fuel ethanol and which computes an "additional availability of 250 million gallons yearly for export [to the United States], beginning in 1985." The United States ambassador to Brazil sent the following letter dated July 5, 1984 [RD 94] to the defendant Commissioner of Customs.

> Recently my Senior Commercial Officer, Mr. Emilio Iodice, and I met with Shegeaki Ueki, the president of the Brazilian state petroleum company Petrobras. Among the subjects we

[71] In Slip Op. 85–98, p. 4, Judge Carman determined the difference between this duty and 5% *ad valorem* to be approximately 58 cents per gallon.

[72] RD 16 (letter from Harvey B. Fox to Maulik H. Radia stamped August 2, 1985). *See* RD 3, RD 7, RD 23, RD 40 and RD 91.

discussed was the tariff treatment of Brazilian anhydrous alcohol exported to the U.S.

Because of the lack of foreign exchange due to growing debt service requirements, Brazil has become a world leader in the substitution of fuel alcohol for gasoline in automobiles. Unfortunately (from Brazil's perspective), the very high U.S. tariffs on alcohol have greatly limited exports of Brazilian alcohol to the U.S.

As you can see from Mr. Ueki's note, Petrobras is interested in obtaining a favorable tariff ruling on the importation of anhydrous alcohol that is pre-blended with additives such as MTBE, BTX and others. According to Mr. Ueki, the product would be used as an additive to gasoline. What the Brazilians are interested in is finding some formula to export a product of alcohol, but which is different enough to qualify for a lower tariff rate.

In view of the bad news they are about to get on alcohol in the Congress and from the States of California and Florida, a positive response on this subject would elicit a most positive reaction on the part of the Brazilians. It would serve somewhat to mitigate what has been considered here a growing protectionism stance on our part.

I realize that you do not normally involve yourself in details like this, but I would appreciate your help in seeing that Mr. Ueki's letter gets to the right office in Customs. After the ruling is made, I would be happy to transmit it to Mr. Ueki * * *.

Customs responded favorably to this plea on September 12, 1984, concluding that item 901.50 TSUS would not be applied.[73] Predictably, this resolution to disregard the plain meaning of this law engendered protests from domestic interests such as those now plaintiffs in this case[74] and inquiries from members of Congress. For example, Senators Robert Dole and Richard G. Lugar sent a letter to Secretary Baker on July 17, 1985, stating, among other things:

We are concerned about certain recent Customs Service letter rulings pertaining to the importation of certain so-called mixtures of ethanol with various other petroleum based additives. These rulings effectively contravene Congressional intent. Unless they are immediately revoked, there will be a substantial loss of revenue to the U.S. Treasury and a threat to the economic viability of a major new U.S. industry.

The clear intent of Congress was to impose a special duty on imported fuel ethanol in order to offset corresponding U.S. tax exemptions for the sale of ethanol/gasoline blends. The current amount of this duty is 60¢ per gallon plus a 3% ad valorem tax. These letter rulings permit a defacto [*sic*] repeal of this duty if the imported ethanol is simply mixed with as little as 7% toluene or other similar additive. RD 98.

---

[73] *See* RD 94 (letter from Arthur P. Schifflin to Hon. Diego C. Asencio).
[74] *See, e.g.*, RD 78 (letter from Stephen L. Urbanczyk, Esq. to Harvey B. Fox (July 3, 1985)).

Recipients of the "letter rulings" referred to included RAJ, Citicorp, Certified Oil Company and Southern Missouri. With the exception of Southern Missouri, those letters were sent in June 1985. *See* RD's 20, 84. In fact, Citicorp's brief states that

> Citicorp had been exploring the possibility of importing mixtures containing ethanol since late 1984 and entered into an agreement with Petrobras in May 1985 to import a small quantity of an ethanol/toluene mixture. It imported 2.2 million gallons of this ethanol/toluene mixture, which was entered in July 1985. This was a "trial lot" (called "CitiChem I") which Citicorp sold to its customer, Chemical Fuels Corporation. The mixture imported in July consisted of 92.5 percent Brazilian ethanol and 7.5 percent toluene. Although *the Customs Service had not issued a ruling letter to Citicorp specifically for this shipment* Citicorp believed, and Customs agreed, that the ethanol/toluene mixture was not dutiable under TSUS 901.50 because the Customs Service has so ruled such in other cases: * * * Citicorp was entitled to rely on those rulings * * *.[75]

Trial run or not, Customs issued revocation letters to Citicorp and the other proposed importers on or about August 2, 1985,[76] conditioned as follows:

> This revocation is made pursuant to section 177.9(d)(1), Customs Regulations, and is effective with respect to all entries made after 5:00 pm local time, August 2, 1985. Entries made prior to that time will be governed by the ruling previously issued to you. With respect to any entries made after the effective date of the instant ruling, Customs will consider all facts and evidence submitted by you in connection with claims of reliance on the ruling previously issued you.

The issue[77] raised by this decision, as phrased by defendants at page 3 of their memorandum, is whether the Customs Service had authority to permit the importation of ethanol blends beyond August 2, 1985, without the payment of duties at the rate provided for under item 901.50, TSUS, following issuance of the foregoing revocation rulings. The court concludes that the answer to this question is that Customs did not have such authority.

As Justice Holmes once stated on behalf of a unanimous Supreme Court, "there is no canon against using common sense in construing laws as saying what they obviously mean." *Roschen* v. *Ward,* 279 U.S. 337, 339 (1929). Another unanimous[78] Court, in

[75] Trial Brief of Citicorp, p. 6, n. 12 (citations omitted; emphasis added). Apparently, RAJ brought a shipment of fuel ethanol into Houston. The testimony thereon is unclear as to whether it arrived pursuant to a prior Customs letter, but, in any event, it was subjected to a duty of 5% *ad valorem* prior to the Customs revocation letter of August 2, 1985 at issue herein. *See* Radia Deposition, p. 13.

[76] *See supra* n. 72. The letter to Southern Missouri [RD 40] is stamped August 7, 1985, and its effective date is stated to be that date as opposed to August 2nd.

[77] Defendants' Memorandum of Law lists as its first issue whether a cause of action lies against them. Slip Op. 85–119 determined that causes do lie, the remedies for which are discussed hereinafter in Point V.

[78] Justices Marshall, Rehnquist and O'Connor took no part in the decision. *See* 467 U.S. at 866.

Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), noted that:

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent * * *. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect. 467 U.S. at 843 n. 9 (citations omitted).

Here, once the defendants had come to admit their erroneous disregard of the law, they opted for a course called reliance between the Scylla and Charybdis of their own creation. This choice compounded their error. Indeed, the ruminations at pages 8–9 of their memorandum of law are revealing, to wit:

> Within its judgment and discretion, the Customs Service could have implemented the substance of its August 2 (and 7), 1985 revocation decision(s) in several ways. It could have advised the recipients that it intended to revoke the earlier favorable rulings 90 days hence (*i.e.* on November 1, 1985), thereby providing 90 days notice (and perhaps permitting a flood of imports). Alternatively, the Customs Service could have done nothing and on November 1, 1985, revoked the rulings without notice (thereby potentially injuring importers and domestic purchasers). Additionally, the Customs Service might have implemented the revocations of August 2 and 7, 1985, in modified form by providing for a longer (or shorter) "grace period." Alternatively, the Customs Service could have declined to act on plaintiffs' request (RD Nos. 78 and 134) for administrative reconsideration of its original rulings (*i.e.,* the ones revoked by the August 2 and 7 rulings) and compelled plaintiffs to initiate formal proceedings pursuant to the provisions of 19 U.S.C. §1516. Finally, the Customs Service could have determined that a uniform and established practice existed (if investigation had permitted such a finding), thereby permitting importation of ethanol blends without the duties provided for under item 901.50, TSUS, until 30 (or 90) days following publication of the notice in the Federal Register * * *. [footnote omitted]

Expediency, however, having once failed the defendants, is not the correct guidepost—notwithstanding the validity of much that surrounds this presentation in their memorandum. For example, no one disputes 19 U.S.C. §3's grant to the Secretary of the Treasury of the "superintendence of the collection of the duties on imports as he shall judge best" or the power to promulgate rules and regulations encompassed in 19 U.S.C. §1624 or the authority to prescribe forms of entries found in 19 U.S.C. §66. But whatever the breadth of such statutory parameters, they do not accommodate defendants' actions in this case.

Sections 1624 and 66 of Title 19 are claimed to be *pari materia,*[79] which makes the general powers set forth therein subject to the restraint "not inconsistent with law." The law here (item 901.50, TSUS) provides:

> Ethyl alcohol (provided for in item 427.88, part 2D, schedule 4) when imported to be used in producing a mixture of gasoline and alcohol or a mixture of a special fuel and alcohol for use as a fuel, or when imported to be used otherwise as fuel * * * *. 60¢ per gal.[80]

There is nothing in the record before the court to indicate that between the time of this item's enactment in 1980 and 1984 the defendants had difficulty with either its plain meaning or its enforcement. Moreover, whatever uncertainty may have developed thereafter was laid to rest at the start of August 1985, as quoted above, page 39. In fact, the defendants have left the intervenor-defendants to contend now that "TSUS 901.50 was not intended to apply to mixtures,"[81] which, in the view of these importers, are properly classified under item 432.10, TSUS.[82] But this position glosses over the intended *use* of the Brazilian ethanol, namely, mixed with gasoline[83] to fuel motor vehicles, which brings it within the ambit of item 901.50. If the intent were otherwise, each gallon could be subjected to the distilled spirits tax prescribed by 26 U.S.C. § 5001(a)(1), depending on the degree of denaturement by substances like the aromatic hydrocarbon toluene. That is, toluene is added to ethyl alcohol to avoid this tax, and not that of item 901.50. *Cf.* 26 U.S.C. § 5214(a)(1)(c).

The defendants attempt to rely on 19 U.S.C. § 1315(d), which provides, in pertinent part:

> No administrative ruling resulting in the imposition of a higher rate of duty or charge than the Secretary of the Treasury shall find to have been applicable to imported merchandise under an established and uniform practice shall be effective with respect to articles entered for consumption or withdrawn from warehouse for consumption prior to the expiration of thirty days after the date of publication in the Federal Register of notice of such ruling; * * *

But defendants' own revocation letters in this case [RD 3, 7, 16, 23, 40, and 91] deny the existence of any "established and uniform practice", and no publication of their decision(s) to revoke therefore

[79] *See* Defendants' Memorandum of Law, p. 10, n. 11.

[80] Unless the context indicates otherwise, the court's references in this opinion to this item 901.50, TSUS encompass, necessarily, item 427.88.

[81] Trial Brief of Citicorp, p. 39.

[82] *See generally id.* at 40–43; RAJ Post-Trial Brief, pp. 51–55. The court notes in passing that the prescribed rate of duty for this item is "5% ad val., but not less than the highest rate applicable to any component compound." The mixture referred to in the Customs correspondence with Citicorp dated June 12, 1985 contemplated 92.5% ethanol; the mixture specified in the letter to RAJ dated June 3, 1985 was 89–92.5% ethanol, the rest benzene, toluene or xylene. Hence, that prescription, on its face, brings item 427.88, and thus item 901.50, into account.

[83] Under Formula No. 20 of the Treasury Department's Bureau of Alcohol, Tobacco and Firearms, 27 C.F.R. 21.24, denaturing ethyl alcohol with unleaded gasoline restricts it to fuel use.

occurred. In short, Section 1315(d), with its 30-day grace period, is inapposite.

The defendants opted for a period of 90 days from the date of their revocation(s), and their counsel refer the court to the Customs Service's general-ruling-procedure regulations, specifically, 19 C.F.R. § 177.10(e). However, that regulation, covering effective dates of published decisions, provides for immediate application of rulings, except that

> a change of practice resulting in the assessment of a higher rate of duty or increased duties shall be effective only as to merchandise entered for consumption or withdrawn from warehouse for consumption on or after the 90th day after publication of the change in the Federal Register.

The defendants admit, however, that their "revocation does not constitute a change in practice warranting publication," [84] and they therefore cannot rely on the time period of this regulation.

Finally, the defendants seek support in 19 U.S.C. § 1514(c)(2), but the 90-day period in that section of the Tariff Act of 1930 is the amount of time permitted for the filing of a protest of decisions within the purview of subsection (a) thereof. Nothing in that statutory section contemplates the kind of time lapse at issue here.

The Supreme Court has stated in *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. at 415, and other cases, that decisions of a cabinet Secretary are entitled to a presumption of regularity, but the Court also has pointed out the "presumption is not to shield his action from a thorough, probing in-depth review."

Such a review in this case shows a clear-out attempt by the defendants not to apply the correct rate of duty prospectively, albeit limited to a period of 90 days. While their own regulation on the effect of a revocation of the kind at issue here, 19 C.F.R. § 177.9(d)(2), proscribes retroactive application,[85] it does not provide for a prospective non-enforcement of the proper duty. Of course, if it did not provide the regulation could run afoul of the long-standing rule that the Secretary of the Treasury cannot, by his regulations, alter or amend a revenue law. *See, e.g., Morrill* v. *Jones,* 106 U.S. 466, 467 (1883); *Czarnikow-Rionda Company* v. *United States,* 60 CCPA 6, 9, C.A.D. 1071, 468 F.2d 211, 214 (1972). In any event, there is no such regulation, nor is there any statute protecting defendants' conduct in this case. As the Supreme Court stated as long ago as 1836:

> The Secretary of the Treasury is bound by the law, and although in the exercise of his discretion he may adopt necessary

[84] Defendants' Memorandum of Law, p. 15, n. 15. The other sections of Part 177 of the Service's regulations cited in this memorandum, to wit, 19 C.F.R. 1770.0, 177.1, 177.9(a), 177.9(c), 177.9(d)(1) and 177.9(d)(2), do not support defendants' position, nor do they support the position of the intervenor-defendants.

[85] Presumably, this is why the revocation letters [*see* supra p. 42] state that "[e]ntries made prior to that time [5 p.m. on Aug. 2, 1985] will be governed by the ruling previously issued to you" and also why those entries are not now challenged by the plaintiffs.

> forms and modes of giving effect to the law, yet, neither he nor those who act under him, can dispense with, or alter any of its provisions.[86]

This principle remains just as true today. *E.g., Chemung County* v. *Dole,* 781 F.2d 963, 968 (2d Cir. 1986) ("Government agencies are not at liberty to violate statutory commands").

IV

The foregoing conclusion of the court that the defendants acted in excess of their statutory authority obviates a need to review the importer claims of reliance presented to the Customs Service. However, review of those claims, pressed now by the intervenor importers before the court, further reveals the unlawfulness of defendant's actions.

In *Bowman Transportation, Inc.* v. *Arkansas—Best Freight System, Inc.,* 419 U.S. 281, 285–86 (1974), the Supreme Court summarized the appropriate scope of judicial review under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A),[87] as follows:

> Under the "arbitrary and capricious" standard the scope of review is a narrow one. A reviewing court must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment * * *. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute it judgment for that of the agency." *Citizens to Preserve Overton Park* v. *Volpe, supra,* at 416. The agency must articulate a "rational connection between the facts found and the choice made." *Burlington Truck Lines* v. *United States,* 371 U.S. 156, 168 (1962). While we may not supply a reasoned basis for the agency's action that the agency itself has not given, *SEC* v. *Chenery Corp.,* 332 U.S. 194, 196 (1947), we will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned. *Colorado Interstate Gas Co.* v. *FPC,* 324 U.S. 581, 595 (1945).

In this case, the agency's governing regulation, 19 C.F.R. § 177.9(d), which Customs relied on in issuing its revocation letters on August 2 (and 7), 1985, states:

> *Modification or revocation of ruling letters*—(1) *Generally.* Any ruling letter found to be in the error or not in accordance with the current views of the Customs Service may be modified or revoked. Modification or revocation of a ruling letter shall be effected by Customs Headquarters by giving notice to the person to whom the ruling letter was addressed and, where cir-

---

[86] *Tracy* v. *Swartwout,* 35 U.S. 80, 95 (1836).

[87] The Customs Courts Act of 1980, 28 U.S.C. 2640(d), requires this court to review a case such as this under Section 706.

cumstances warrant, by the publication of a notice or other statement in the Customs Bulletin.

(2) *Effect of modification or revocation of ruling letters.* The modification or revocation of a ruling letter will not be applied retroactively with respect to the person to whom the ruling was issued, or to any person directly involved in the transaction to which that ruling related, *Provided:*

(i) The request for a ruling contained no misstatement or omission of material facts,

(ii) The facts subsequently developed are not materially different from the facts in which the ruling was based,

(iii) There has been no change in the applicable law,

(iv) The ruling was originally issued with respect to a prospective transaction, and

(v) All of the parties involved in the transaction acted in good faith in reliance upon the ruling and retroactive modification or revocation would be to their detriment.

Nothing in this paragraph will prohibit the retroactive modification or revocation of a ruling with respect to a transaction which was prospective at the time the ruling was issued, inasmuch as such a transaction was not entered into in reliance on a ruling from the Headquarters Office or the Regional Commissioner, New York Region.

The areas of contention herein are those within the purview of subsections (iv) and (v), primarily the latter. On this point, the testimony of the Customs decisionmaker, Mr. Roth is:

> We found no evidence that would be inconsistent, in our opinion, with a finding of good faith, however. *With respect to detriment we made no finding that a particular agreement was binding or with respect to the relief, if any, which would have been available under force majeure or similar provisions contained in a particular agreement.*[88]

In view of this admission that there was no finding as to detriment, a key question is whether the administrative record[89] supports RAJ and Citicorp claims of such reliance.[90]

A. *The Record on RAJ*

To begin with, the administrative record certified by decisionmaker Roth does not contain the request for a ruling apparently made by RAJ on May 6, 1985. Be that as it may, RAJ, seemingly on the advice of counsel,[91] assumed that a ruling letter would be

---

[88] Attachment to page 126 of transcript of deposition of John T. Roth on October 15, 1985 [hereinafter cited as "Roth Deposition"] (emphasis added).

[89] As indicated in Point I above, the parties agree that the actions of the defendants are to be measured by the contents of this record. The defendants, as well as RAJ and Citicorp, objected at the start of the trial to any supplementation of that record, and this court has concluded that it is not at liberty to disregard the certification of the decisionmaker as to the contents of the record before him.

[90] The importers assert essentially two types of reliance claims, one involving business activities they engaged in in connection with the June 1985 ruling letters. The second involves importation of fuel ethanol after Customs had agreed in August 1985 to grandfather such shipments.

[91] *See* RD 21 (letter from R. Sarah Compton, Esq. to Harvey B. Fox (Aug. 9, 1985) [hereinafter cited as "Compton August 9 Letter"], stating at page 5 that "[i]n May 1985, RAJ Chemical contacted Washington counsel and

Continued

issued automatically.[92] It did not wait for such a letter, but rather entered as of May 9, 1985 into what it now claims was a binding contract to supply the Beacon Oil Company in California with approximately four million gallons of ethanol monthly for one year.

The documents submitted by RAJ to the Customs Service, however, do not confirm the existence of such a contract with Beacon. The document in the record purported to be the contract [RD 21, Ex. 5] is not signed, nor does it reflect the name of the other party.[93] RAJ submitted to Customs a copy of a telex to an undisclosed party, dated May 15, 1985, that made reference to its offer to sell ethanol/toluene as of May 9th. *See* RD 21, Exhibit 4. In this telex, Mr. Radia listed the conditions for a letter of credit and stated that RAJ has yet to receive a telex from the putative buyer "accepting our agreement as out lined [*sic*] in our telex of May 9, 1985."[94]

The May 15 telex projected a "loading date around May 25, 1985." RD 21, Exhibit 4. At that time, RAJ apparently was attempting to negotiate the purchase of ethanol from Brazil. On May 9th, Mr. Radia had reduced to a writing to S.A. Costa Pinto Exportacao e Importacao ("CP") what he apparently believed was a CP offer for the sale of four million gallons of ethanol/toluene and RAJ's counter offer to purchase eight million gallons.[95] Mr. Radia had telexed CP on May 12th and agreed to "reluctantly accept" an offer for four million gallons at a price of two cents more per gallon than the price RAJ had contemplated paying for the same quantity in the May 9 telex. *See* RD 21, Exhibit 7.

RAJ claims that these documents show that a contract "was negotiated and executed on the 'spot market.'"[96] On May 22nd, a letter of credit was posted for RAJ's benefit. *See* RD 42. Under its terms, the bank would pay if RAJ provided documents showing delivery of ethyl alcohol into the buyer's tank at Redwood City, California.[97] While the quantity was not specified, the price per gallon

---

was informed that the Asencio letter was accurate, valid and in effect") and (Affidavit of Maulik H. Radia, para. 11 (Aug. 7, 1985)).

[92] Counsel and Mr. Radia contend that RAJ received oral assurances from the Customs Service's Import Specialist in New York that the item 901.50 duty would not be levied and that a ruling letter would be issued upon request. *See* Compton August 9 Letter, p. 5 and Radia Affidavit, pp. 3–4.

RAJ could not have relied on the oral assurances of the Import Specialist. While oral inquiries regarding rulings may be made, the regulations clearly state that the "Customs Service will not issue rulings in response to oral requests. Oral opinions or advice of Customs Service personnel are not binding on the Customs Service." 19 C.F.R. 177.1(b).

[93] If the absence of any signature or name was the result of redaction for fear of disclosure of confidential information, that fear was unwarranted in view of safeguards such as 19 C.F.R. 103.15, which provides that

> the disclosure of information relative to the business of one importer or exporter that is acquired by a Customs officer or employee in an official capacity to any person not authorized by law or regulations to receive this information is a ground for dismissal from the United States Customs Service, suspension, or other disciplinary action, and if done for a valuable consideration subjects that person to criminal prosecution.

[94] RD 21, Exhibit 4, p. 2. The administrative record does not include a copy of a telex dated May 9th to the putative buyer.

[95] *See* RD 21, Exhibit 6. The record does not contain a response from CP.

[96] Compton August 9 Letter, p. 6. While the documents show that RAJ had agreed to the price fixed by CP on May 12th, there is evidence in the record that CP was still considering the terms of the proposal on May 15th, and its response was due by the end of May 16th. In his telegram to the California buyer, Mr. Radia mentioned that "the attorneys of the Brazillian [*sic*] Company is [*sic*] studying the terms and conditions [*sic*] of the sale and should respond by end of May 16, 1985." RD 21, Exhibit 4, p. 2.

[97] The buyer's name was apparently redacted by RAJ from the copy it sent to the Customs Service.

and the amount of the letter of credit were. Simple arithmetic discloses that the letter was for the purchase of six million gallons.

The letter of credit posted for the benefits of RAJ did not bind it to sell any ethanol. RAJ could draw on that letter if it provided the bank with proper documentation of receipt of the alcohol. RAJ would not be penalized on account of the letter of credit if it failed to make delivery. In its reply brief, page 48, RAJ attempts to shift the burden to the plaintiffs to explain why a letter of credit would be posed if RAJ had no obligations to perform. But, at the administrative level, the burden was on RAJ to supply sufficient evidence as to its reliance claims.

Customs issued its ruling letter to RAJ on June 3, 1985. *See* RD 17. However, if RAJ had binding agreements, the contents of the administrative record suggest their existence prior to this date and therefore that no rational basis existed for the Service's acceptance of a RAJ claim of actual reliance on the letter.

The court also fails to discern a rational basis for any Customs accceptance of RAJ's claim that it entered into its supply contract on June 24, 1985.[98] A June 24 agreement[99] established that CP would be the exclusive supplier and that RAJ would be the exclusive buyer of "the product" for four markets in the United States, including California. Under its terms, RAJ would lose the status of exclusive buyer if it failed to purchase for each market minimum monthly orders. It would also lose its status if it failed to place minimum first orders by specific dates set forth in the agreement.[100] But, contrary to RAJ's claim, this agreement did not obligate it to purchase anything from CP. Rather, RAJ was given an option to buy ethanol at a price that "will be negotiated under good faith on a case by case basis."[101] In any event, there simply is nothing in the record that shows that the ethanol/toluene for the September 4 shipment at issue herein was purchased by RAJ pursuant to the June 24 agreement.

The plaintiffs have attempted to show that the order for this shipment was placed on August 1, 1985 and accepted on August 2nd.[102] But plaintiffs' cross-examination of Mr. Radia proves that this shipment was not sent in respone to such an order. In effect, Mr. Radia testified that he paid almost six cents less for the fuel ethanol than the price stated in his August 1 offer.[103] The admin-

[98] *See* RD 22, p. 2 (letter dated August 16, 1985 from R. Sarah Compton, Esq. to Harvey B. Fox).

[99] RAJ provided Customs with two copies. In one, the product is defined as "anhydrous alcohol blended with more than 5% denaturing agents from Brazil." In the other, the product is defined as "anhydrous alcohol mixed with toluene, xylene or benzene from Brazil." *See* RD 21, Exhibit 12.

[100] The first order for California had to be placed by August 15, 1985., The first order for each of the other three markets had to be placed by July 10, 1985. The record does not reflect that RAJ placed timely orders for those other markets.

[101] RD 21, Exhibit 12. Of course, Section 2-305(1) of the Uniform Commerical Code provides that "parties if they so intend can conclude a contract for sale even though the price is not settled."

[102] *See* Plaintiffs' Post-Trial Brief, pp. 83–84. Plaintiffs' purpose is to show that RAJ entered into a contract at a time when it was known in the industry that Customs was revoking its ruling letters.

[103] *Compare* Tr. at 132 *and* Radia Deposition, p. 15 *with* RD 21, Exhibit 12, p. 5.

istrative record does not contain any explanation for such a sudden price reduction.

RAJ has attempted to venture outside this record, but the attempt only weakens its argument. At trial, RAJ offered an exhibit (4) that shows that the letter of credit was transferred for the benefit of CP. The document, dated May 25, 1985, states the price per gallon to be the same as the amount indicated in the Radia testimony. The total value of the transfer equaled six million times the listed gallon price.

The conclusion to be drawn from the record (and the offered exhibit) is that the September 4 shipment was made pursuant to a May agreement.[104] The price in the letter of credit and the quantity correspond to the price which RAJ paid and to the quantity which it received,[105] and the delivery was made to the port indicated in the letter of credit.[106] In sum, examination of RAJ's record before Customs constrains this court to conclude that it was arbitrary, capricious and an abuse of discretion for the Service to have acquiesced in RAJ's claims of reliance.

B. *Citicorp's Record*

Citicorp made three importations of fuel ethanol from Brazil [107] without payment of the duty prescribed by item 901.50, TSUS. The first, aggregating 2.2 million gallons of 92.5 percent ethanol and 7.5 percent toluene, was landed in July 1985. Citicorp admits that this shipment was made pursuant to May 1985 agreement with the Brazilian supplier and without any prior Customs approval. *See supra* p. 41.

The company's first request for a ruling letter was apparently made in June. On June 19, 1985, Customs issued the requested ruling. *See* RD 8. The administrative record indicates that in July Citicorp engaged in negotiations by telex with a Brazilian supplier for the immediate purchase of eight million gallons of ethyl alcohol/unleaded gasoline. On July 18th, Citicorp made and offer to the supplier. *See* RD 51 at 4. On July 19th, the supplier responded with a counter offer of the same quantity at ten cents more per gallon. *See id.* at 5. Citicorp had until July 22nd to accept; it responded on that date, agreeing on price, provided that loading occurred that week and that freight did not exceed a specified price per gallon.

---

[104] Although the record is unclear as to why a clause—6—in the June 24 agreement attempting to void any previous contract did not have that effect on the May order, the record is clear that RAJ and CP did not treat that order as void.

[105] The price which RAJ agreed to pay for four million gallons on May 13, 1985 was one quarter of a cent less per gallon than what was paid.

[106] The May 25 transfer of the letter of credit listed the shipment terms C.I.F San Francisco. This term was clarified in a telex of May 31 requiring deliver "C.I.F. into the buyers tank at Pilot Terminal, Redwood City, California." RAJ trial Exhibit 4 at 3. This same telex requires the shipment C.I.F. San Francisco. *Id.*, p. 5. Such usage of these two cities within one document is understandable in light of their proximity and Customs Service inclusion or Redwood City within the port of San Francisco. *See* e.g., T.D. 44731, 59 Treas. Dec. 680 (1931). *See also* T.D. 56020, 98 Treas. Dec. 582 (1963); T.D. 79-74, 13 Cust. Bull. 169; T.D. 82-9, 16 Cust. Bull. 22; and 19 C.F.R. 101.3(b).

[107] Citicorp apparently has only recently entered into this business. A person with over 40 years of experience in the industry testified that Citicorp "is not generally known as being active in the production or sale of ethanol". Schwandt Deposition, p. 55.

See id. at 6. The supplier rejected these conditions on July 23rd, apparently because Citicorp had failed to understand that, under the offer, it would be responsible to supply the transportation.[108] Citicorp was afforded an opportunity to request a price for a C.I.F. or C & F transaction.[109] Citicorp responded on the same day, requesting an offer on a C & F basis.[110] The record does not reflect the supplier's making of an offer in accordance with this request. However, the supplier made an offer, dated July 25th,[111] for the sale F.O.B. Santos at the price agreed to in the earlier telexes. *See* RD 51 at 21. The offer specified that it was "valid for acceptance until July 26, 1985, close business New York time." *Id.* at 20. Citicorp responded that day by nominating a vessel and demanding that the ethyl alcohol/unleaded gasoline meet quality standards specified in the telex. It requested that the supplier telex confirmation of acceptance of the conditions and stated that "[u]pon receipt of this information we will confirm acceptance of your offer." *Id.* at 19. The supplier responded that same day, agreeing to Citicorp's selection of the vessel but disagreeing as to the quality specifications. The supplier offered final product specifications "as it is" in the tanks in Santos, Brazil. *See id.* at 18. The supplier stated in that telex that Citicorp should confirm on July 29th.[112]

No such confirmation is contained in the record, nor can it be persuasively argued that the parties had agreed on the basic terms and were just missing a formality. There was no agreement on the fundamental issue of product quality, and this court therefore cannot conclude that it was not arbitrary, capricious and an abuse of discretion for Customs to accept the claim of reliance made by Citicorp. A July 29 telex from the company, confirming an agreement, was not submitted to Customs and therefore could not have been considered when the Service made its decision. However, even if that document, produced at trial as Citicorp Exhibit 11, were part of the record before the decisionmaker, it would not have demonstrated sufficient detriment—for the confirmation, as well as the offer dated July 25, contain broadly-worded *force majeure* clauses

[108] *See* RD 51 at 7. The various telexes all state F.O.B. Brazil or Santos as a shipment term. U.C.C. Section 2-319 reads:

> (1) Unless otherwise agreed the term F.O.B. (which means "free on board") at a named place, even though used only in connection with the stated price, is a delivery term under which
>
> (a) when the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in this Article (Section 2-504) and bear the expense and risk of putting them into the possession of the carrier; or
>
> (b) when the term is F.O.B. place of destination, the seller must at his own expenses and risk transport the goods to that place and there tender delivery of them in the manner provided in this Article (Section 2-503); * * *

The term used in the documents here falls under subsection (a). That is, F.O.B.-the-place-of-shipment requires the buyers to pay the cost of transportation from the point of embarkment.

Citicorp expressed concern about the potential freight charges in its telex of July 22. The July 23 telex shows that the Brazilian supplier became concerned that Citicorn did not understand what an F.O.B.-the-place-of-shipment term means.

[109] *See* RD 51 at 7. U.C.C. Section 2-320(1) states that the "term C.I.F. means that the price included in a lump sum the cost of the goods and the insurance and freight to the named destination. The term C. & F. or C.F. means that the price so includes cost and freight to the named destination."

[110] *See* RD 51 at 8. This request is further indication of misunderstanding.

[111] The offer appears to have been signed on July 16, 1985. *See* RD 51 at 20.

[112] *See* RD 51 at 18. This extended the period for acceptance beyond July 26th.

which gave Citicorp an option of not accepting the fuel ethanol after Customs revoked its ruling letter.

Citicorp urges the court to consider its entering into a downstream contract because of reliance on its ruling letter. *See* Trial Brief of Citicorp, p. 8. The administrative record, however, only contains a July 26 offer to purchase eight million gallons by one of Citicorp's customers.[113] The offeror specifically requested confirmation of the proposed purchase agreement. *See* RD 51 at 10. No such confirmation is in the record, and therefore the Customs Service could not have made its finding of reliance on the basis of a binding downstream contract.

Citicorp offered at trial a copy of this agreement,[114] but the court notes that it too has a broadly-worded *force majeure* clause. Citicorp's assertion that this clause will not be invoked even if it is required to pay the contested duty [115] has no bearing on its claim of reliance.[116] The critical question here is not whether Citicorp will pay that duty but whether the Customs Service's revocation of its ruling letter obligated Citicorp, as a matter of law, to bear the burden of any payment.

Citicorp also attempts to show that it chartered a ship to transport the fuel ethanol on the basis of its ruling letter. *See* Reply Brief of Citicorp, p. 50 and Trial Exhibit 9. A confidential memorandum to the Commissioner of Customs from the Director of the Classification and Value Division with a handwritten date of 8/8/85 states that Citicorp would have lost more than $450,000 if that vessel had left Brazil without the alcohol. *See* RD 70, pp. 1–2. Reliance was deemed to exist because Citicorp had submitted "documentary evidence demonstrating that the vessel in question has been chartered prior to August 2nd."[117] Contrary to this assertion, there is nothing in the administrative record which documents Citicorp chartering of the ship.

In order to make a determination as to reliance, Customs would have had to examine the charter-party and determine whether Citicorp was bound by its terms.[118] Moreover, if its indicated date is reliable, the confidential memorandum [RD 70] is nothing more than a post-hoc rationalization for the Service's decision on August 7, 1985 [RD 6] to permit Citicorp to import some eight million gal-

[113] *See* RD 51 at 9. The price was to be mutually agreed upon and consistent with a prior contract also contained in the record.

[114] Citicorp Exhibit 10.

[115] *See* Trial Brief of Citicorp, p. 18, n. 54.

[116] Customs has an obligation to collect duties. The business decisions of importers as to how to allocate payment of those duties are generally beyond the ken of the Service.

[117] RD 70, p. 2. This confidential memorandum indicates that one Boyden Gray either influenced, or attempted to influence, the Service's acquiescence in Citicorp's claim of reliance.

The 1985–1986 Congressional Directory lists (at page 445) C. Boyden Gray as Counsel and Deputy Chief of Staff in the Office of the Vice President of the United States. Apparently, Mr. Gray had had a meeting on July 26, 1985 with "Brazilian Guests" and "Citibank Officers", among others, to discuss the "Brazilian Ethanol Export Program to [the] US". *See* RD 50 at 5.

[118] At trial, Citicorp offered a copy of a charter-party [Exhibit 9], but the cost of demurrage in that document is much less than the $450,000 mentioned by the Director of Classification and Value. Furthermore, Citicorp trial Exhibit 12 (letter from Citicorp counsel to Harvey B. Fox dated August 7, 1985) was not part of the certified record before the decisionmaker.

lons of fuel ethanol from Brazil without payment of the item 901.50 duty. Since the decisionmaker had no documentary proof of the terms of the charter-party,[119] the court concludes that his acquiescence in the claim of reliance was arbitrary, capricious and an abuse of discretion.

The third Citicorp shipment, consisting of approximately 11 million gallons of ethanol/gasoline from Brazil, was entered in late October 1985. Customs determined to grandfather this shipment on the basis of Citicorp's purported reliance.

Citicorp claimed that it had entered into a contract with several Brazilian suppliers at a meeting on July 26, 1985. *See* RD 50, Exhibit 1. The administrative record, however, only shows that a letter of intent, subject to confirmation, was entered into on that day. On August 1st and 2nd, Citicorp telexed the proposed suppliers to confirm the sales agreement. *See* RD 49, Exhibits 5–7. One of those suppliers responded on August 2nd in a telex:

> I want to advise you that it is not possible to reconfirm the sales agreement at this moment because we are not sure about the consequences in terms of the general agreement that we are doing with the American government. Otherwise, we need our minister's confirmation. I'm trying to get a solution today but I think that it will not be possible. I will be contacting you again this coming Monday. RD 49, Exhibit 8.

Citicorp did not submit to Customs anything substantiating that the agreement was ever confirmed. *See* Roth Deposition, p. 184. In its trial brief, page 10, Citicorp admits that the suppliers were unable to confirm as of August 2nd, the day Customs revoked its ruling letter. On their part, the defendants take the position that the downstream contract was not reduced to a signed writing until August 6th. *See* Defendants' Memorandum of Law, p. 25.

In entering into a contract after it knew of the revocation of its ruling letter, Citicorp assumed the risk of having the item 901.50 duty imposed. Moreover, Citicorp, which was well aware in July that Customs was considering revoking its ruling,[120] carefully protected itself by drafting *force majeure* clauses into its proposed agreements to purchase [121] and to sell the ethanol. A Vice President of Citicorp International testified that, at a meeting with the various suppliers and the proposed downstream purchaser of July 26th, "there were substantial discussions relating to force majeure and it was explicitly stated to exclude changes in Customs law, government regulations and similar type of actions." Berry Deposition, p. 25.

---

[119] Reference to the chartering of a vessel in the record is contained in a letter from Citicorp's attorney dated August 5, 1985 that accompanied documents submitted to Customs. *See* RD 51, p. 2.

[120] *See, e.g.*, Trial Brief of Citicorp, p. 11.

[121] The original memorandum that was prepared for the purchase of the fuels from the Brazilians apparently did not contain a *force majeure* clause, but there was an understanding among all of the parties that a change in the Customs ruling would provide a vehicle for the renegotiation of the agreement. *Compare* RD 50, p. 9 *with* transcript of deposition of Charles L. Berry on December 12, 1985 [hereinafter cited as Berry Deposition], p. 26.

In light of the lack of binding contracts as of August 2, 1985 and of Citicorp's ability to avoid these agreements on the ground of revocation of its ruling letter, there does not appear to be a rational basis for the Customs Service's decision to grandfather shipments made pursuant thereto. Therefore, this court concludes that that decision was arbitrary, capricious and an abuse of discretion.

C. *Customs Post-Revocation Notifications Not Ruling Letters*

Subsequent to revocation on August 2 (and 7), 1985 of its earlier ruling letters, Customs began notifying Citicorp, RAJ and other importers, commencing with a letter to Citicorp on August 7th [RD 6], that they could import the specified quantities of fuel ethanol without payment of the item 901.50 duty until November 1, 1985 based on their presentations as to reliance.[122] The defendants posit the issue as follows at page 3 of their memorandum:

> Assuming, *arguendo,* that the Customs Service had authority to permit entry of ethanol blends without payment of the duty provided by item 901.50, TSUS, whether the August 7, 23, and 27, 1985 decisions to do so were in derogation of law.

For their part, Citicorp and RAJ now argue that these notifications from Customs constitute "ruling letters."[123] Under its regulation, 19 C.F.R. § 177.9(a), ruling letters bind the Service. Such a letter's function is to state what Customs believes is "the proper classification of an article under the provisions of the Tariff Schedules of the United States." 19 C.F.R. § 177.9(b)(2).

The letters at issue in this case did not do this. Rather, they simply notified the importers of Customs' intent to disregard what it then knew to be the mandated classification and rate of duty for fuel ethanol. Clearly, those notifications were not ruling letters.

Section 177.1(d) of Title 19, C.F.R. defines a ruling letter as "a ruling issued in response to a written request therefor and set forth in a letter addressed to the person making the request or his designee." A ruling letter issued prior to the filing of entry documents is a letter that is capable of being "attached to the documents filed in connection with that transaction with the appropriate Customs Service field office or otherwise br[ought] * * * to the attention of the appropriate Customs officer." 19 C.F.R. § 177.8(a)(2).

An examination of the grandfather decisions herein shows that at least some of them required additional documentation by the importers before Customs would issue a letter that could be attached to the import documents. For example, the August 27 notice sent to Citicorp stated that, prior to any entry, the importer would have to provide Customs with

[122] *See* RD 2 (Certified Oil Company—Aug. 12, 1985); RD 15 (RAJ— Aug. 23, 1985); RD 1 (Certified), RD 5 (Citicorp), RD 14 (RAJ), RD's 24, 25 (Valley Green International Trading Corp.) and RD 39 (Southern Missouri) Aug. 27, 1985); RD 121 (Southern Missouri—Oct. 11, 1985); and RD 131 (Citicorp—Oct. 18, 1985).

[123] *See e.g.*, Trial Brief of Citicorp, pp. 13 and 48 and RAJ Reply Brief, p. 56.

> written notification identifying the name of the vessel, the quantity of mixture to be unladed, the port of entry, the importer number, and the agreement under which such shipment was made. This information should be sent to the Director, Classification and Value Division, U.S. Customs Room 2216, 1301 Constitution Ave., NW., Washington, D.C. 20229. We will examine this information and, if the shipment is found to be made pursuant to and in accordance with the agreement(s) you have previously provided us, *we will provide you with a letter to be presented to Customs port officials at the time the shipment is entered.* A separate letter must be obtained for each shipment. RD 5, pp. 1–2 (emphasis added).

On its face, this notice was incapable of being presented with the entry documents. It merely advised that, if further information were supplied, Citicorp would receive a letter that could be presented to Service officers.

Citicorp sent a letter with details on September 4, 1985,[124] and Customs responded on September 6th with letters to be presented upon entry. *See* RD 63. The September 4 letter to Customs and the September 6 letters to Citicorp cannot be construed as a request for, and the issuance of, ruling letters since this case had already been commenced on August 29th. According to 19 C.F.R. § 177.7(b), no ruling letter will be issued with respect to any matter which is pending before this Court of International Trade.

Finally, contrary to citicorp's contention,[125] the defendants have not characterized their decisions to grandfather as ruling letters. In fact, their counsel in this case has carefully refrained from deeming those decisions ruling letters.

The intervenor-defendants argue that it would be inequitable to make them now remit the correct duty in view of their reliance on the advice of Customs. This argument has little merit with regard to the August 27 decisions, as the degree of reliance by the importers is minimal, if not non-existent. Indeed, Brazil imposed an embargo on shipments of ethanol on the day of those decisions which remained in effect at least until September 13, 1985. *See* Sept. 13 Tr. at 37. Also, by that point, the importers were clearly on notice that there was a serious challenge to the validity of those decisions.

Similarly, RAJ could not have relied much on the notification it received dated August 23, 1985 since it had shipped the ethanol around August 8th. In other words, its shipment was already on the high seas. Arguably, RAJ would not have entered that shipment without a decision from Customs, but the vessel arrived on September 4th, or after this case had been commenced. At that point, RAJ could have decided not to enter the ethanol—an option it may well have originally contemplated.

---

[124] *See* RD 62.

[125] Citicorp asserts at page 49, n. 132 of its trial brief that the "Customs Service regards the August 7 and 27 letters as ruling letters". It cites the deposition testimony of Harvey B. Fox, page 10, line 4, to page 11, line 7, but that transcript does not support the assertion.

One of Citicorp's shipments left Brazil after Customs had determined on August 7th to grandfather it. Citicorp, however, assumed the risk of paying the correct duty when it entered the fuel ethanol after this case had been brought. The importer still had the option not to enter the shipment.

Just prior to the filing of the case, a so-called Ad Hoc Committee of the Ethanol Importers had urged Customs in a legal memorandum dated August 27, 1985 to comply with the requrements of 19 U.S.C. § 1315(d) and 19 C.F.R. § 177.10(c) for the following reason, among others:

> ADM is likely to challenge any delayed effective date. Therefore, a procedurally defective delay gives no assurance to the importers. If it is intended that the importers be treated fairly in light of their reasonable reliance on valid letter rulings, any delayed effective date must of necessity be procedurally defensible or the importers risk judicial reversal of the delayed effective date. The risk of such a reversal is unacceptably large if no legal basis exists to support the delayed effective date. Thus, giving a delayed effective date without sound legal underpinning is to give nothing.[126]

In summary, whether the reliance issue is reviewed as a whole or in individual detail, the record is short of substantiation of the kind of good faith contemplated by the Customs regulation governing the effect of revocation of ruling letters. On the contrary, the record reflects the type of arbitrary and capricious behavior[127] that the Administrative Procedure Act was enacted to remedy. Stated another way, the Service's judgment is not anchored in the language and spirit of its own regulation. *Cf. Freeport Minerals Co.* v. *United States,* 776 F.2d 1029, 1032 (Fed. Cir. 1985).

V

Both RAJ and Citicorp argue that, if the plaintiffs are entitled to any relief, it should be prospective only.[128] Inherent in their argument, of course, is the concept that liquidation of the contested September and October fuel ethanol entries retroacts to the period before revocation; that is, the entries are the equivalent of those

---

[126] Plaintiffs' trial Exhibit 2. As indicated above, this court denied supplementation of the administrative record as against the defendants. This exhibit is referred to only in connection with any attempted portrayal of the intervenor-defendants as unwitting importers.

Indeed, page 2 of the list of documents attached to the Roth Affidavit indicates that this document was forwarded to the defendants under cover of a letter from Citgo's counsel dated August 27, 1985. The same list also indicates that a 5-page document in the name of the Ad Hoc Committee was forwarded to the defendants at the same time by counsel for RAJ. In its reply brief, pages 61–62, RAJ now argues that the Ad Hoc Committee submission was an attempt to persuade the Service to institute notice and comment procedures before reconsidering the original ruling letter. Such a lobbying effort by importers hardly amounts to a recognition that the grandfather rulings were unlawful.

[127] The court notes in passing that the agency record contains a letter from the defendant Commissioner to Senator Dole [RD 95] wherein the author states in the context of the "ethanol classification issue":

> My experience as Commissioner of Customs, has been, that certain importers are often ingeniously clever at developing methods or schemes to avoid paying the appropriate duties on products they import * * *. Oftentimes * * * importers find a loophold or other methods of manipulating the tariff schedules to their benefit * * *.

[128] *See, e.g.,* RAJ Reply Brief, pp. 58, 64; Reply Brief of Citicorp, pp. 39, 43.

RAJ and Citicorp entries which occurred before August, the liquidation of which at the incorrect 5% *ad valorem* rate of duty is not challenged in this case.

The question of retroactivity can be complex,[129] but no such problem is presented here. In view of the facts and circumstances discussed in preceding Part IV, as well as the traditional standard that the rate and amount of duty assessable in liquidation are to be determined by the law in force at the time of importation,[130] this court concludes that genuine retroactivity is not at issue in this case.

Nevertheless, RAJ places great emphasis on *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971). In that personal injury case under the Outer Continental Shelf Lands Act, the Supreme Court conceded that its decision in *Rodrigue* v. *Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), "entirely changed the complexion" [131] of *Huson* in that a one-year state period of limitation, rather than the admiralty doctrine of laches, was applicable. Since that state period had expired, the question left was application of this change in judicial doctrine to the individual tort plaintiff. In resolving this issue in favor of nonretroactive application, the Court summarized its prior holdings as follows, 404 U.S. at 106–07:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, *e.g., Hanover Shoe* v. *United Shoe Machinery Corp., supra,* at 496, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, see, *e.g., Allen* v. *State Board of Elections, supra,* at 572. Second, it has been stressed that "we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter* v. *Walker, supra,* at 629. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano* v. *City of Houma, supra,* at 706.

However, even if this case were an appropriate one for analysis of the foregoing factors, such analysis would not lead to a determination not to impose the correct duty on the fuel ethanol entered in September and October. Certainly, this opinion neither overrules clear past precedent on which the litigants may have relied nor

---

[129] *See, e.g.,* Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision,* 126 U.Pa.L.Rev. 47 (1977).

[130] *See, e.g., United States* v. *Miles,* 57 CCPA 1, 4, C.A.D. 967, 416 F.2d 973, 975 (1969).

[131] 404 U.S. at 99.

does it decide an issue of first impression of the kind resolved in *Allen* v. *State Board of Elections,* 393 U.S. 544 (1969), where the purview of a section of the newly-enacted Voting Rights Act of 1965 was at issue.

As to the second *Huson* factor, RAJ argues that this court "should determine whether retroactive application of th[is] decision will promote the purpose of the rule in question." RAJ Post-Trial Brief, p. 100. The classic case cited by the Supreme Court, *Linkletter* v. *Walker,* 381 U.S. 618 (1965), decided that the exclusionary rule, made applicable to state criminal proceedings by *Mapp* v. *Ohio,* 367 U.S. 643 (1961), should not govern other cases finally resolved prior to *Mapp.* Of course, the purpose of that rule is as "the only effective deterrent to lawless police action." 381 U.S. at 636. No judicial rule of such moment is at issue in the case at bar, which simply seeks imposition of the duty on imports of fuel ethanol *after* the Customs Service's reconfirmation of the correct, applicable rate.

Thirdly, both RAJ and Citicorp contend that the equities favor nonimposition of the item 901.50 duty. The Court concluded in its opinion in *Cipriano* v. *City of Houma,* 395 U.S. 701, 706 (1969), that "[s]ignificant hardships would be imposed on cities, bondholders, and others connected with municipal utilities" if its decision invalidating property-taxpayer votes to approve the issuance of revenue bonds were given full retroactive effect. No such broad-scale hardship is conceivable here, but payment of the applicable duty will no doubt be painful. Recently, however, the Supreme Court was constrained to remind the government's adversary that:

> Justice Holmes wrote: "Men must turn square corners when they deal with the Government." *Rock Island, A.&L.R. Co.* v. *United States,* 254 U.S. 141, 143 (1920). This observation has its greatest force when a private party seeks to spend the Government's money. Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law; respondent could expect no less than to be held to the most demanding standards in its quest for public funds. This is consistent with the general rule that those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law.[132]

The Court's footnote to this reminder quotes from *Federal Crop Insurance Corp.* v. *Merrill,* 332 U.S. 380, 384 (1947) to wit:

> * * * Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. The scope of this authority may be explicitly defined by Congress or be limited by delegated legislation, prop-

[132] *Heckler* v. *Community Health Services of Crawford County, Inc.,* 467 U.S. 51, 63 (1984).

> erly exercised through the rulemaking power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority.

That footnote also cites *United States* v. *California*, 332 U.S. 19, 39–40 (1947); *United States* v. *Stewart*, 311 U.S. 60, 70 (1940); *United States* v. *San Francisco*, 310 U.S. 16, 31–32 (1940); *Wilber National Bank* v. *United States*, 294 U.S. 120, 123–124 (1935); *Utah* v. *United States*, 284 U.S. 534, 545–546 (1932); *Jeems Bayou Fishing & Hunting Club* v. *United States*, 260 U.S. 561, 564 (1923); *Sutton* v. *United States*, 256 U.S. 575, 579 (1921); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409 (1917); *Pine River Logging & Improvement Co.* v. *United States*, 186 U.S. 279, 291 (1902); *Hart* v. *United States*, 95 U.S. 316, 318–319 (1877); *Gibbons* v. *United States*, 75 U.S. (8 Wall.) 269, 274 (1869); *Lee* v. *Munroe*, 11 U.S. (7 Cranch) 366, 368–69 (1813).

The cases are indeed legion on this point. For example, in *Atlantic Richfield Company* v. *Hickel*, 432 F.2d 587 (10th Cir. 1970), the holder of leases pursuant to the Mineral Leasing Act of 1920 had paid royalties for more than 13 years before the Department of the Interior (and ultimately its Secretary) demanded additional royalties based on an interpretation of the statute at odds with the ruling of the Acting Director of the Geological Survey originally given and relied on during the intervening years. The court of appeals referred to

> the established principle that the United States may not be estopped from asserting a lawful claim by the erroneous or unauthorized actions or statements of its agents or employees, nor may the rights of the Untied States be waived by unauthorized agents' acts. As harsh as the tenet is under practical application, an administrative determination running contrary to law will not constitute an estoppel against the federal government.
> 432 F.2d at 592 (footnote omitted).

Dixon v. *United States*, 381 U.S. 68, 72–73 (1965), states:

> In *Automobile Club of Michigan* v. *Commissioner*, * * * we held that the Commissioner [of Internal Revenue] is empowered retroactively to correct mistakes of law in the application of the tax laws to particular transactions. He may do so even where a taxpayer may have relied to his detriment on the Commissioner's mistake. See *Manhattan General Equipment Co.* v. *Commissioner*, 297 U.S. 129. This principle is no more than a reflection of the fact that Congress, not the Commissioner, prescribes the tax laws. The Commissioner's rulings have only such force as Congress chooses to give them, and Congress has not given them the force of law. Consequently it would appear that the Commissioner's acquiescence in an erroneous decision, published as a ruling, cannot in and of itself bar the United States from collecting a tax otherwise lawfully due. [footnote omitted]

The Court's opinion then quoted at 381 U.S. at 74 from its *Manhattan General Equipment Co.* decision as follows:

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law * * * but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. 297 U.S. at 134.

While the tax law has changed over the years since these decisions, the foregoing principles enunciated by the Supreme Court have not. *See e.g., Consolidated Edison Company of New York, Inc.* v. *United States,* 782 F.2d 322, 325 (2d Cir. 1986):

> * * * [E]ven if the 1976 ruling could be construed as some discernible modification of the tax law, such modification would still properly apply to Con Ed's 1972–76 taxes, given the Commissioner's board authority to apply correct rulings retroactively.

Here, of course, a defendant is the Commissioner of Customs (and not of Internal Revenue), and he is making no apparent attempt to collect the duties prescribed by Congress. That is, there seems to be an abdication of the mission of the Customs Service to collect and protect the revenues and to enforce the laws.[133] *See generally* Department of the Treasury, U.S. Customs Service, *Fundamentals of Customs Tariff & Trade Operations,* pp. ii–iii (May 1983). It is this void which the plaintiffs are attempting to remedy.

It is argued at length, however, by Citicorp that the plaintiffs lack standing to obtain relief from the failure to collect the proper duty. *E.g.,* "No case of which we are aware supports plaintiffs' position." Reply Brief of Citicorp, p. 38. But this argument overlooks *Zenith Radio Corp.* v. *United States,* 710 F.2d 806 (Fed. Cir. 1983), wherein the court sustained the domestic interested party's standing to obtain suspension of liquidation of earlier entries on the following ground, among others:

> * * * Even though the '79–'80 imported articles have already been sold and the increased duties (if Zenith ultimately prevails) will go to the government, not Zenith, Zenith still has a strong, continuing, commercial-competitive stake in assuring that its competing importers will not escape the monetary sanctions deliberately imposed by Congress. Defeat of that strong congressionally recognized competitive interest and the

[133] The court in *Coalition to Preserve the Integrity of American Trademarks.* v. *United States,* No. 84-5890 (D.C. Cir. May 6, 1986), pointed out [slip op. at 32] that "the Customs Service has historically enforced what it regards to be the law so relentlessly that it required an amendment to the statute to permit tourists to bring items intended for personal use back into the country with them."

> abrogation of effective judical review are sufficient irreparable injury here.[134]

Or, the Supreme Court stated 150 years ago in another Customs case, *Tracy* v. *Swartwout,* 35 U.S. 80, 95 (1836):

> * * * It would be a most dangerous principle to establish, that the acts of a ministerial officer, when done in good faith, however injurious to private rights, and unsupported by law, should afford no ground for legal redress.

Much more recently, the Court in *Flast* v. *Cohen,* 392 U.S. 83 (1968), sustained the standing of taxpayers to sue to enjoin the disbursement of federal funds appropriated under Title I of the Elementary and Secondary Education Act of 1965 for the benefit of nonpublic schools, and *Aguilar* v. *Felton,* 105 S.Ct. 3232 (1985), affirmed the taxpayers' right to a permanent injunction against use of those funds in sectarian schools. *Cf. Felton* v. *Secretary, United States Department of Education,* 787 F.2d 35 (2d Cir. 1986). As for collection of taxes, the court in *Abortion Rights Mobilization, Inc.* v. *Regan,* 544 F.Supp. 471 (S.D.N.Y. 1982) and 603 F.Supp. 970 (S.D.N.Y. 1985), has twice upheld the standing of certain plaintiffs to seek a permanent injunction against continued exemption from taxation under 26 U.S.C. §501(c) of two organizations.

The defendants and intervenor-defendants have argued from the outset that the only avenue to legal redress of issues of the kind raised by the plaintiffs is via a petition under the Tariff Act of 1930, 19 U.S.C. § 1516. To the extent this argument is still pressed now, however, it disregards this court's conclusion in Slip Op. 85-119 and repeated here that this case entails causes of action independent of the Tariff Act, to wit:

> There is no doubt that a petition pursuant to Section 1516 is the primary and traditional means of challenging the classification or rate of duty upon designated imported merchandise, but the foregoing absolutist argument seemingly disregards the precise nature of this action. Here, the defendants have accepted plaintiffs' position that item 901.50, TSUS applies, *i.e., there is no dispute as to classification or rate of duty within the meaning of Section 1516.* Rather, the controversy stems from defendants' determination to deviate from the duty. The plaintiffs seek to counteract this transitory digression, in part through declaratory judgment and mandamus, both federal-

---

[134] 710 F.2d at 810. In *Simon* v. *Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 39 (1976), the Court stated that the necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Art. III requirement." In discussing the "prudential" component of standing in *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.,* 438 U.S. 59, 80-81 (1978), the Court stated:

> * * * Where a party champions his own rights, and where the injury alleged is a concrete and particularized one which will be prevented or redressed by the relief requested, the basic practical and prudential concerns underlying standing are generally satisfied when the constitutional requisities are met. See, *e.g., Arlington Heights* v. *Metropolitan Housing Dev. Corp.,* 429 U.S. 252 (1977).

In the case at bar, plaintiffs ADM and A.E. Staley meet these standards.

> court remedies of long standing and independent of remedies prescribed by the Tariff Act of 1930.[135]

Subsection (c)(1) [of 28 U.S.C. § 2643] is a general grant of authority for the Court of International Trade to order any form of relief that it deems appropriate under the circumstances. It is the Committee's intent that this authorization be deemed to grant the Court of International Trade remedial powers co-extensive with those of a federal district court. This provision makes it clear that the court may issue declaratory judgments, writs of prohibition and mandamus, orders of remand, and preliminary or permanent injunctive relief * * * [136]

RAJ and Citicorp (as well as Certified), over the government's opposition, intervened as parties in this case, raising in their papers a panoply of issues, including the applicability of item 901.50, TSUS and their obligations, if any, to the United States as a result of their importation of the Brazilian fuel ethanol.[137] RAJ and Citicorp, having voluntarily submitted themselves to the jurisdiction of the court, actively joined issue with the plaintiffs and availed themselves of their rights to be heard and to present evidence in support of their positions.

After carefully considering those positions, this court concludes that they do not insulate the fuel ethanol entries at issue from payment of the full duty prescribed by Congress for importation of that substance. To the extent Customs has not yet liquidated those entries, the Service will be enjoined from doing so at a rate other than that mandated under item 901.50, TSUS. RAJ and Citicorp are obligated to remit the additional duties on their entries already liquidated.

Judgment will enter in accordance with this opinion which represents the court's findings of fact and conclusions of law.

---

[135] 623 F.Supp. at 1268 (emphasis added). If there were a dispute with Customs as to classification and rate of duty, Section 1516 confers automatic standing on domestic interested parties such as ADM and A.E. Staley to file an administrative protest. The absence of such a dispute herein has forced these complainants to satisfy a higher standard for relief, namely, proof of actual injury within the meaning of Article III of the Constitution.

For many years, domestic interested parties have been permitted to compel enforcement of tariffs. *See, e.g., Bradford Co.* v. *American Lithographic Co.*, 12 Ct. Cust. App. 318, T.D. 40318 (1924); *United States* v. *Nylonge Corp.*, 48 CCPA 55, C.A.D. 764 (1960). In fact, the tradition of third-party involvement began prior to the enactment of Section 1516. *See, e.g., Wakem* v. *United States*, T.D. 25827 (C.C.N.D.III. 1904); *United States* v. *Schwartz & Co.*, 3 CT Cust. App. 24, 49, T.D. 32315 (1912); *But compare Fletcher* v. *United States* 25 CCPA 195, T.D. 49294, 92 F.2d 713 (1937), *with Luggage and Leather Goods Manufacturers of American* v. *United States* 7 CIT 258,588 F.Supp. 1413 (1984).

[136] H.R. Rep. No. 1235, 96th Cong., 2d Sess. 61 (1980). Moreover, subsection (a) of 28 U.S.C. 2643 provides:

> The Court of International Trade may enter a money judgment—
>
> (1) for or against the United States in any civil action commenced under section 1581 or 1582 of this title; and
>
> (2) for or against the United States or any other party in any counterclaim, cross-claim, or third-party action under section 1583 of this title.

The Committee report indicates that the intent of subsection (a) is to bypass reliquidation in appropriate cases. *See id.* at 60.

The facts and circumstances herein clearly show that this is an appropriate case by bypass reliquidation. To the extent the defendants are bound by 19 U.S.C. 1514, 28 U.S.C. 2643(b) empowers the court to hold a hearing on the correct amount of duties owed—if the parties herein prove unable to compute them independently.

[137] November 1, 1985 was the last day of the Service's grace period. Although Citicorp did not formally seek to intervene before the end of this period, it was aware of proceedings herein since at least September 11, 1985 when Mr. Kellogg and its attorney were both present with defendants' counsel during the hearing on the temporary restraining order. *See* transcript of September 11, 1985, p. 4. Mr. Kellogg also addressed the court during the hearing on the preliminary injunction application but chose not to make a formal appearance. *See* Sept 13 Tr. at 168.

RAJ filed its motion to intervene on September 6, 1985, and it too has been privy to this case from the outset.

(Slip Op. 86-56)

AMERICAN CUSTOMS BROKERS CO., PLAINTIFF *v.* U.S. CUSTOMS SERVICE, DEFENDANT

Court No. 86-04-00526

OPINION AND ORDER

[Plaintiff's motion for preliminary injunction granted.]

(Decided May 27, 1986)

Law Offices of Leonard M. Fertman (*Leonard M. Fertman* and *Donald A. Rezak*) for plaintiff.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, and *Nancy Reich*, Civil Division, United States Department of Justice, for defendant.

RESTANI, *Judge:* Plaintiff American Customs Brokers (ACB) is a licensed customhouse broker. As such, it enters goods as an agent of the importer of record or as the importer of record itself. When immediate delivery is involved, it exercises the immediate delivery privileges of its principal, the importer of record, in the first instance, and it exercises its own immediate delivery privileges in the latter case.[1] In late March, the United States Customs Service (Customs) discontinued plaintiff's immediate delivery privileges for an indefinite period, ostensibly because ACB listed erroneous social security or tax identification numbers on entry papers of a number of automobiles which were entered under bond pending installation of emissions control and automobile safety equipment meeting U.S. standards.[2] In addition, ACB was denied the right to act as a broker on any transaction involving the immediate delivery privileges of any other party acting as importer of record. Approximately one month after the discontinuance of the privileges, plaintiff filed a complaint seeking a temporary restraining order, and preliminary and permanent injunctions reinstating these privileges. The court issued a temporary restraining order on April 30, 1986, barring Customs from continued implementation of the revocation

[1] 19 U.S.C. § 1448(b) (1982) authorizes the Secretary of the Treasury to provide by regulation for the issuance of special permits for delivery, prior to formal entry. The holder of an immediate delivery privilege may secure the immediate release of imported goods by submitting certain documentation to the customs inspector for examination at the port of entry. If the documents are in order, the merchandise is released immediately without advance payment of the duty. In some situations a bond must also be posted to obtain release. The documents are then returned to the broker, who must thereafter complete the entry documents and pay the duty. 19 C.F.R. §§ 142.21-142.29 (1985).

[2] Other charges including failure to maintain power of attorney forms on file have been made. The information provided the court by the government on the additional charges is minimal and the standards for preliminary injunction were not discussed in terms of those charges.

pending disposition of plaintiff's motion for a preliminary injunction, now before the court.

The parties do not dispute the following facts underlying the action. In May of 1985, Customs seized two vehicles entered by ACB because the entry identification numbers were not social security numbers issued by the Social Security Administration.[3] Shortly thereafter, ACB provided the correct numbers and the vehicles were released. On November 27, 1985, ACB received a letter from Customs informing it that an audit of the firm would be conducted by Customs on December 12, 1985, to determine compliance with customs regulations. Upon completion of the audit, Customs concluded that of the 242 entries into the Los Angeles, California district that contained erroneous social security numbers in identifying importers of record, 102 were entries in which ACB had acted as broker.[4] In response to this finding, Customs decided to take the action challenged here. On March 28, 1986, Aileen Colon, Chief Inspector of Customs at Terminal Island, orally informed representatives of ACB of Customs' decision. Subsequently, plaintiff's representatives had several discussions with Customs in an attempt to identify reasons for the discontinuance and to persuade Customs to reinstate the privileges. When these discussions proved unsatisfactory to plaintiff, plaintiff filed suit in this court.

Plaintiff contends that, at a minimum, it was entitled to written notice and an opportunity to respond before Customs could discontinue its privileges. It claims that the procedures followed by Customs deprived it of its rights to procedural due process, rendering the discontinuance invalid. Thus, plaintiff seeks to have its privileges reinstated until the matter can be resolved on the merits.

The Court of Appeals for the Federal Circuit has defined the criteria for issuance of a preliminary injunction as follows:

> (1) the threat of immediate irreparable harm;
> (2) the likelihood of success on the merits;
> (3) whether the public interest would be better served by issuing rather than denying the injunction; and
> (4) whether the balance of hardships on the parties favors issuing the injunction.

Zenith Radio Corp. v. *United States,* 710 F.2d 806, 809 (Fed. Cir. 1983); *S. J. Stile Associates, Ltd.* v. *Snyder,* 68 CCPA 27, 30, 646 F.2d 522, 525 (1981); *Azurin* v. *United States*, 10 CIT ——, Slip Op. 86-30 at 5 (Mar. 17, 1986).

---

[3] A person or entity engaged in Customs transactions is required to file Customs Form 5106 with its first formal entry or the first request for services that will result in the issuance of a bill or a refund check. Customs then issues an identification number, which can be the Internal Revenue Service employer number, a social security number, or a number assigned by Customs. 19 C.F.R. § 24.5 (1985). Because of the three digit, two digit, four digit pattern of the numbers submitted on the entry forms of plaintiff, Customs understood a social security number to be used.

[4] It is not clear from the record whether the number of noncomplying numbers submitted by plaintiff was 102 or 104. This minor discrepancy is not material.

To demonstrate irreparable injury, plaintiff must prove that unless the injunction is awarded, some harm will result to it that cannot be reasonably redressed in a court of law. *National Juice Products Association* v. *United States,* 10 CIT ——, 628 F. Supp. 978, 984 (1986) (citing *Manufacture de Machines du Haut Rhin* v. *Von Raab,* 6 CIT 60, 569 F. Supp. 877, 881–82 (1983)). In making this determination, the court must focus on the immediacy of the harm and the adequacy of future corrective relief. *S. J. Stile,* 63 CCPA at 30, 646 F.2d at 525 ("A presently existing, actual threat must be shown."); *Azurin,* 10 CIT at ——, Slip Op. 86–30 at 5 ("An injury is irreparable if it cannot be undone through monetary remedies."); *National Juice Products,* 10 CIT at ——, 628 F. Supp. at 984 (the magnitude of the injury is not critical, rather the immediacy of the injury and the adequacy of the future relief).

It does not appear to be disputed here that immediate delivery privileges are an important part of plaintiff's operations. In addition, plaintiff has submitted affidavits (and has produced detailed testimony) that demonstrate that it has lost existing business accounts and has had to forego business opportunities due to the revocation of its immediate delivery privileges. There appears to be evidence of substantial harm to business good will, business reputation and a significant loss of new business. *See Lois Jeans & Jackets, U.S.A., Inc.* v. *United States,* 5 CIT 238, 242, 566 F. Supp. 1523, 1527 (1983) (Customs order to redeliver goods enjoined where loss of past and future sales and injury to reputation as a reliable supplier constituted irreparable injury); *cf. Mutual of Omaha Insurance Co.* v. *Novak,* 775 F.2d 247, 249 (8th Cir. 1985) (court affirmed finding of irreparable injury based on injury to business reputation and good will arising from alleged trademark infringement). It is very difficult to accurately access these types of damage for purposes of monetary recovery. In addition, it is doubtful that the defendant would be subject to suit for the actions alleged here. *See* 28 U.S.C. § 2680 (1982). "The possibility that adequate compensatory or other corrective relief will be available at a later date * * * weighs heavily against a claim of irreparable harm." *National Corn Growers Association* v. *Baker,* 9 CIT at ——, 623 F.2d 1262, 1275 (1985) (quoting *Sampson* v. *Murray,* 415 U.S. 61, 90 (1975), quoting *Virginia Petroleum Jobbers Association* v. *FPC,* 259 F.2d 921, 425 (D.C. Cir. 1958)). Inasmuch as plaintiff has offered substantial evidence on this point and defendant has offered no evidence to the contrary, the court concludes that plaintiff has suffered and will continue to suffer irreparable harm if its immediate delivery privileges are further discontinued.

The second element of the test of whether a preliminary injunction is warranted is an examination of whether plaintiff is likely to succeed on the merits of the case. The court notes that the likelihood of success need not be shown to be a "mathematical probability." *Azurin,* 10 CIT at ——, Slip Op. 86–30 at 6 (quoting *American*

Institute for Imported Steel, Inc. v. *United States,* 8 CIT 314, 600 F. Supp. 204, 209 (1984), citing *Committee to Preserve American Color Television* v. *United States,* 4 CIT 202, 204, 551 F. Supp. 1142, 1144 (1982)).

The regulation in question, § 19 C.F.R § 142.25(a), allows the district director of customs to revoke an importer's immediate delivery privileges under certain circumstances.[5] Defendant argues that this section applies to brokers, as well, and the court agrees. Inasmuch as brokers may obtain special permits under regulations allowing "importers" to be granted immediate delivery privileges, Customs' argument that the discontinuance provisions of section 142.25 also applies to brokers is entirely reasonable.[6] The question then arises as to whether section 142.25 applies to the denial of a broker's ability to use a separate importer of record's immediate delivery privileges where that importer is the principal in the transaction, assuming other requirements, such as the proper power of attorney, are met. The answer to this question does not appear on the face of section 142.25. In addition, there is the issue of whether either penalty was imposed according to the proper procedures.

In assessing whether procedural due process was accorded to plaintiff, the case of *Gallagher & Ascher Company* v. *Simon,* 687 F.2d 1067 (7th Cir. 1982), is instructive. In that case, a limited suspension of the immediate delivery privileges of a broker for failure to make timely entries was upheld, but the broker in *Gallagher,* unlike plaintiff here, remained free to use the importer's/principal privileges. The Seventh Circuit found that 5 U.S.C. § 558(c) [7] was

---

[5] 19 C.F.R. § 142.25(a) (1985) reads as follows:

§ 142.25 Discontinuance of immediate delivery privileges.

(a) *Authority of district director.* The district director may discontinue immediate delivery privileges if the importer:

(1) Has failed repeatedly to file the applicable Customs documentation set forth in § 142.22(b) timely without justification, or

(2) Has not taken prompt action to settle a claim for liquidation damages issued under § 142.27 for failure to file the applicable Customs documentation set forth in § 142.22(b) timely. "Prompt action" means that the importer, within the time specified in a claim for liquidated damages shall petition for relief or pay the amount claimed and, file the applicable documentation and deposit estimated duties, if any.

(3) Has repeatedly delivered documentation required by § 142.22(b) which is incomplete or which contains erroneous information.

[6] Plaintiff has directed the court's attention to 19 C.F.R. § 142.25(c), which uses the term "brokers" with regard to discontinuance of immediate delivery privileges. This provision reads as follows:

(c) *Brokers; restriction.* A broker shall not circumvent an action taken under this section by applying for the immediate release of the importer's merchandise in the broker's name and under the broker's bond.

The existence of this provision does not preclude the inclusion of brokers within the term "importers" as used in § 142.25(a), however. Instead, the regulation appears to be addressing the two different roles a broker can play in import transactions, i.e., the broker can act as an agent for another party who is the importer of record or the broker can itself be the importer of record. The broker cannot move into the latter category merely for the purpose of assisting an importer to avoid the penalties imposed under § 142.25.

[7] 5 U.S.C. § 558 (1982) reads in pertinent part as follows:

§ 558 Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses.

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

applicable in that the permit granting immediate delivery privileges was a form of license.[8] The court held that a full adjudicatory hearing was not required under section 558(c) and need only be provided when another statute requires a hearing. *Id.* at 1074. The court observed, however, that section 558(c) allows a "second chance" to be provided the offending party. *Id.* at 1074, 1075. Under section 558(c) a written warning with opportunity to demonstrate compliance or to amend conduct accords a broker a second chance before discontinuance of its immediate delivery privileges. In this case, unlike the *Gallagher* case, ACB did not receive the formal warning contemplated by section 558(c). Defendant argues that plaintiff was warned when the two automobiles were seized approximately one year ago and when, subsequently, plaintiff received written notice that an audit was to be commenced. The audit letter, however, mentioned no allegations of wrongdoing and no specific adverse action by the agency was mentioned. This would appear inadequate to satisfy section 558(c).

Nonetheless, the second chance opportunity of section 558(c) may be omitted if plaintiff's conduct is willful or if public health and safety so requires. 5 U.S.C. § 558 (1982) (*see supra* note 7). Plaintiff contends, and its does not appear to be disputed, that thus far plaintiff's actions have not aided any evasion of health and safety laws. Furthermore, defendant has not alleged any facts which would demonstrate any likelihood that plaintiff's conduct even threatens noncompliance with emissions standards or otherwise endangers health or safety. If such a likelihood existed, plaintiff's rights to section 558(c) notice and opportunity to comply might be precluded. Whether plaintiff's errors over the past year were willful appears to be a genuinely disputed issue.[9] The parties have not briefed the issue of the standard of review applicable to a determination of willfulness. Of course, plaintiff has no fair chance of demonstrating even arbitrary action, unless it is advised of the facts surrounding the revocation. The record is somewhat unclear as to the extent and timing of information provided, but plaintiff has indicated that it only received a list of the nonconforming numbers on the day before oral argument. Unless the charge of willfulness cannot reasonably be disputed, the statutory scheme requires defendant, at some time close to the time of revocation, to advise

[8] Although defendant does not concede this point, it did not substantially brief the issue, and the court finds no reason to disagree with the Seventh Circuit on this point.

[9] Plaintiff disputes that its omissions and misstatements were intentional or were made in careless disregard of statutory requirements. Defendant contends that it had sufficient facts upon which to base a finding of willfulness, citing *Goodman* v. *Benson*, 268 F.2d 896 (7th Cir. 1961). The court finds *Goodman* distinguishable. The court in *Goodman* observed that petitioner Goodman had been informed by his attorney that the limit on rye futures was 500,000 bushels, and had been rebuked by the Commodity Exchange Authority for exceeding the limit. Some time later, but apparently without any change in circumstances, Goodman again exceeded the limit. From these facts, and after affording plaintiff a full opportunity to show that the agency acted unreasonably, the court found that plaintiff knew the correct limit and had "willfully" failed to comply with it. First, plaintiff has not had an opportunity to make its case here, largely because defendant has been reluctant to provide plaintiff with detailed information. Second, although defendant argues that one of plaintiff's employees allegedy admitted to knowingly filing entry papers containing incorrect information, this person is no longer employed by ACB. Thus, it is possible that plaintiff had though that it had eliminated the source of previous problems.

plaintiff of the basis of the willfulness claim, in sufficient detail for plaintiff to confront it.

The question remaining unanswered is whether the prohibition of use of importers' privileges by the broker here is unwarranted under the very terms of 19 C.F.R. § 142.25. The court acknowledges the principle "that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.'" *Butz* v. *Glover Livestock Commission Co.,* 411 U.S. 182, 185 (1973) (quoting *American Power & Light Co.* v. *Securities & Exchange Commission,* 329 U.S. 90, 112 (1946) (quoting *Phelps Dodge Corp.* v. *Labor Board,* 313 U.S. 177, 194 (1941))). Such deference is not warranted, however, if the remedy chosen is "unwarranted in law or . . . without justification in fact." *Butz,* 411 U.S. at 185–86 (quoting *American Power,* 329 U.S. at 112–13). The court does not rule out the possibility that in some cases failure to limit the broker's use of others' immediate delivery privileges would risk substantial harm or would controvert the intendment of section 142.25, but no such examples have been given. It is somewhat difficult to uphold an agency's interpretation of its own regulation which at first glance seems contrary to the language of the regulation and which has not been supported by any substantial arguments concerning the needs of the agency or public policy. The court need not decide this issue nor the issue of whether the agency's conduct was within constitutional bounds [10] inasmuch as Customs apparently has failed to comply with section 558(c). Thus, the court finds a sufficient likelihood of success in establishing lack of statutory due process in discontinuing ACG's privileges.

In determining whether the public interest lies in favor or against the granting of the preliminary injunction, the court must weigh the public interest in due process against the potential harm to the public of allowing plaintiff to continue to enter merchandise using its immediate delivery privileges. Clearly, the public has a strong interest in ensuring that the constitutional and statutory or regulatory procedural due process is provided prior to discontinuance of a customhouse broker's privileges. On the other hand, it has not been demonstrated that deprivation of the privileges will have a significant positive impact on the public welfare. As discussed above, defendant has not demonstrated any likelihood that plaintiff's failure to accurately report the importers' tax or social security numbers has resulted, or will result, in the release (or increased threat of release) of automobiles into the country that fail to meet motor vehicle safety and emission standards. Therefore,

[10] In ffinding no need for a formal hearing the *Gallagher* court observed, citing *Mathews* v. *Eldrige*, 424 U.S. 319 (1976), that the various interests of the parties must be balanced in deciding if the procedures used were sufficient to provide procedral due process. The penalties imposed here were broader than those imposed in *Gallagher*. They are also narrower thant he penalties allowed by 19 U.S.C. § 1641 (1982 & Supp. II 1984), which requires notice and a formal hearing.

the action chosen by Customs, that is, revoking all immediate delivery privileges, results in a basically punitive sanction which will not remedy any immediate harm to the public. While the court does not question the importance of accurate reporting of information on Customs entry documents for many purposes, the public interest in due process outweighs the need to impose immediate sanctions in this case.

Finally, the court must consider whether the balance of the hardships on the parties favors issuance of the injunction. Defendant has not proffered any scenario under which the temporary restoration of plaintiff's immediate delivery privileges will result in hardship to Customs. While the court recognizes that inaccurate information provided to Customs eventually may impair the efficiency of the agency in processing the entries and undertaking its enforcement efforts, defendant could not identify any instances in which the incorrect numbers provided by plaintiff resulted in an inability to ensure that the automobiles in question were properly converted to meet U.S. standards or caused any serious and immediate record keeping problems. In addition, at oral argument defendant acknowledged that in the past few weeks plaintiff's compliance with the regulations has improved considerably. On the other hand, the court has already noted the cognizable irreparable injury that will result to plaintiff if the privileges continue to be revoked. The court concludes that any minor administrative difficulties experienced by defendant are outweighed by the irreparable injury that would result to plaintiff.

Having considered the four criteria for issuance of a preliminary injunction, the court concludes that all four factors favor plaintiff's position that such should be granted. So ORDERED.

(Slip Op. 86-57)

W.Y. MOBERLY, INC., PLAINTIFF v. UNITED STATES, DEFENDANT

Court No. 81-9-01259

Before DICARLO, *Judge.*

Plantiff challenges Customs classification of structural components of oil drilling rigs as "lattice masts * * * and other structures and parts of structures" under item 652.98, TSUS, and its successor provision, item 652.99, TSUS. Plaintiff alleges (1) the merchandise is classifiable as "other boring machinery * * * and parts thereof" under item 664.05, TSUS, on the grounds that that provision is more specific, and (2) if the Court finds the articles are parts of structures, they are more specifically provided for as "columns, posts, beams, girders and similar structural units" under item 652.94, TSUS.

Held: Applying General Interpretative Rule 10(ij), which provides that a part of a part is more specifically provided for as a part of that part (structures) than as a part of a whole (boring machinery), the Court finds that the merchandise, except for the sheaves, is properly classified as parts of structures. The mast components, when assembled, are "lattice masts." Since the merchandise is not of unitary con-

struction, it is not classifiable under item 652.94, TSUS. The sheaves are properly classified as pulleys under item 680.50, TSUS.

[Judgment for defendant.]

(Decided May 28, 1986)

Ross & Hardies (*Joseph S. Kaplan*, *John B. Pellegrini* and *Eric S. Palles*), for plaintiff.

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, Department of Justice (*John J. Mahon*), for defendant.

MEMORANDUM OPINION AND ORDER

DICARLO, *Judge:* Plaintiff challenges the United States Customs Service (Customs) classification of disassembled components of oil drilling rigs as "lattice masts * * * and other structures and parts of structures * * * of iron or steel * * * other" under item 652.98, Tariff Schedules of the United States (TSUS), and 652.99, TSUS, the successor provision to item 652.98, TSUS.

Plaintiff claims the merchandise is properly classified as "boring * * * machinery * * * for earth, minerals or ores * * * and parts thereof" under item 664.05, TSUS, or alternatively, as "columns, pillars, posts, beams, girders, and similar structural units * * * other" under item 652.94, TSUS.

Defendant argues that Customs classification of the merchandise invoiced as "sheaves" was erroneous, and that the sheaves are properly classifiable as "pulleys and shaft couplings, and parts thereof" under item 680.50, TSUS.

The Court holds that the parts of the mast, substructure, floor assembly, and engine stand are classifiable as parts of structures under items 652.98 or 652.99, TSUS, and that the sheaves are classifiable as pulleys under item 680.50, TSUS.

The questions presented are:

(1) Whether structural components of drilling rigs concededly described under tariff provisions for parts of structures and parts of boring machinery are classifiable as parts of structures under General Interpretive Rule 10(ij), which provides that part of a particular part is more specifically provided for as a part of that part (structures) than as a part of a whole (boring machinery), or as parts of boring machinery, under the principle that an article described by two provisions is classifiable under the item which more specifically describes it;

(2) Whether, if the imported merchandise is classifiable as parts of structures under General Interpretive Rule 10(ij), it is more specifically provided for as "columns, pillars, posts, beams, girders and similar structural units, under item 652.94, TSUS; and

(3) Whether under General Interpretive Rule 10(ij), the sheaves are specifically described as "pulleys", under item 680.50, TSUS.

The parties stipulate that:

(1) The merchandise involved in this civil action consists of fabricated components of three oil drilling rigs designated as Penrod 24, 25 and 27.

(2) Each imported fabricated component is a subcomponent of one or more of the following drilling rig sections:

(a) mast; (b) substructure; (c) floor assembly;

(d) engine stand.

(3) The oil drilling rigs of which the imported components are parts are transportable rigs. The components themselves, in their imported condition, are designed for and capable of repeated assembly and disassembly and transportation from site to site by truck.

(4) Certain of the imported components *i.e.,* deadline breakover sheave with rear raising frames with pins and safety pins, fastline breakover sheave and slingline equivalent function only in the course of assembly and disassembly of the rig. Each of the remaining components constitutes a subcomponent of one or more of the four major rig sections identified in paragraph 2 above.

(5) The imported components are dedicated to use as parts of a specific complete oil drilling rig and have no other utility.

(6) Except for the sheaves, which when in use rotate on an axis, the imported subcomponents and the major sections described in paragraph 2 into which they are made up, are stationary when in use in oil drilling.

(7) In addition to the imported components, the following components, which were not included in the imported merchandise, are part of the additional equipment needed in order to create a complete drilling rig: hook, block, drawworks, drill line, drill pipe, motive power, rotary table, catworks, catheads, tongs, hydraulic breakout devices, doghouse and drilling console.

(8) The section identified as the floor assembly, among other functions, supports the hook load of 1,125,000 lbs., the casing load of 1,000,000 lbs., and the drill pipe load of 600,000 lbs.

(9) The section identified as the engine stand, among other functions, supports the weight of the engines, 15,000 to 20,000 lbs., in addition to helping to support the hook load.

(10) The section identified as the mast, among other functions, supports the racking board, crown assembly, drill line, hook block, elevators, boom and the wind load.

(11) The section identified as the substructure, among other functions, supports the mast and in turn the hook load.

Pretrail Order, Schedule C.

It is not disputed that the imported articles, when assembled, comprise structural components of drilling rigs, and are described by the tariff provision for parts of structures. It is also undisputed that the drilling rigs are "boring machinery", and the imported merchandise are parts of boring machinery.

The dispute between the parties is essentially a legal one. Plaintiff argues that the merchandise is classifiable under the item that

more specifically describes the merchandise, and since the provision for parts of boring machinery is more specific than the provision for parts of structures, the merchandise is classifiable as parts of boring machinery. Plaintiff also argues that the *Nomenclature for the Classification of Goods in Customs Tariffs* (Customs Co-Operation Council, 1955) (Brussels Nomenclature) persuasively indicates that Congress provided for the merchandise in item 664.05, TSUS.

Defendant contends that under General Interpretative Rule 10(ij), TSUS, a provision for parts of a part prevails over a provision for parts of a whole, and since the merchandise consists of parts of structures that are parts of drilling rigs, the merchandise is classifiable as parts of structures.

General Interpretive Rule 10(ij), provides that "a provision for 'parts' of an article covers a product solely or chiefly used as a part of such article, but does not prevail over a specific provision for such part."

Although the Brussels Nomenclature is a source for ascertaining legislative intent where the languages of the TSUS and Brussels are similar, *Toyota Motor Sales, U.S.A., Inc.* v. *United States,* 7 CIT 178, 585 F. Supp. 649, 655 (1984), *aff'd,* 753 F.2d 1061 (Fed. Cir. 1985); *Jarvis Clark Co.* v. *United States,* 733 F.2d 873, 875 n.2, *reh'g denied,* 739 F.2d 628 (Fed. Cir. 1984), the Court observes that the Brussels Nomenclature, published seven years before enactment of the TSUS by the Tariff Classification Act of 1962, Pub. L. 87-456, contains no instruction similar to General Interpretive Rule 10(ij) with respect to classification of parts, and therefore provides no guidance in this case.

Congress' intent in enacting General Interpretive Rule 10(ij) is found in the *Tariff Classification Study,* published November 15, 1960, prior to the enactment of the TSUS and considered an important source of legislative history. *See United States* v. *Andrew Fisher Cycle Co.,* 57 CCPA 102, 106-07, C.A.D. 986, 426 F.2d 1308, 13110 (1970). The *Tariff Classification Study* describes the purpose of General Interpretive Rule 10(ij) as follows:

> At the present time, much uncertainty exists in connection with the tariff treatment of parts of articles. In some instances, a mere provision for "parts" prevails over much more specific descriptions in the tariff schedules. Even certain "universal" components such as nuts, bolts, screws, and so forth, are sometimes classified as parts of a particular article according to their type and specific uses. *In the proposed schedules, specific provision is made for the more usual components of articles. Under the rule expressed in headnote 10(ij), these specific provisions will prevail over a mere provision for "parts" of a particular article.*

Tariff Classification Study of 1960, Submitting Report, at 19 (emphasis added). The Additional Explanatory Notes and Background

Materials of the *Seventh Supplemental Report* of the *Tariff Classification Study,* published a year after enactment of the TSUS, states at 99:

> General headnote 10(ij)—*Parts.* A provision for "parts" does not prevail over a specific provision for such part. Thus, a provision for "parts" is more specific than a provision for "articles, not specially provided for", but is not more specific than provisions such as the following for: "springs" (item 652.85), "illuminating articles" (items 653.30–.40) "pumps" (items 660.90–661.15), etc.

Plaintiff says cases cited by defendant as applying General Interpretive Rule 10(ij) "are based on the premise that the provision under which merchandise is correctly classifiable is the more specific of the competing provisions," *Plaintiff's Pretrial Legal Memorandum,* at 5, and argues in effect that General Interpretive Rule 10(ij) applies only where the provision for the "part" is more specific than the provision for "parts of the whole."

Plaintiff is correct that each of the cases cited by defendant in support of the principle that a part of a part is more specifically provided for as a part of the part than as a part of the whole also supports the proposition that an article described in two or more provisions is classifiable in the provision which most specifically describes it. *See Korody-Colyer Corp.* v. *United States,* 66 Cust. Ct. 337, C.D. 4212 (1971) (nozzles used as parts of fuel injection pumps incorporated into engines were properly classified as parts of pumps rather than as parts of engines); *Foster Wheeler Corp.* v. *United States,* 61 Cust. Ct. 166, C.D. 3556, 290 F. Supp. 375 (1968) (parts of converters used in a machine are classifiable as parts of converters, not parts of machines); *C.F. Liebert* v. *United States,* 60 Cust. Ct. 677, C.D. 3499 (1968) (parts of clutches used in winches classifiable as parts of clutches rather than as parts of winches).

But the "premise" of these cases is the principle of General Interpretive Rule 10(ij), not, as plaintiff states, that the merchandise is classifiable under the more specific provision. Further, plaintiff misreads the case it cites for the principle that parts are covered in the more specific provision, *Arthur J. Humphreys* v. *United States,* 59 Cust. Ct. 231, C.D. 3128, *aff'd,* 56 CCPA 67, C.A.D. 956, 407 F.2d 417 (1969). At issue in *Humphreys* was the classification of cabinets for radio-phonograph combinations. The Court found that the cabinets were furniture, but were also part of the radio-phonograph combination, and held the cabinets classifiable as part of the whole (radio-phonograph combination) rather than as a part (furniture). Plaintiff says the Court's holding is attributable to its finding that the provision for the whole was more specific than the one which described the part. In fact, the Customs Court held, and the appellate court affirmed, that General Interpretive Rule 10(ij) did not apply since the part provision was not a "specific provision" within General Interpretive Rule 10(ij). The part provision covered "furni-

ture, and parts thereof, *not specially provided for*" (emphasis added). Merchandise is not "specifically" described within the meaning of General Interpretive Rule 10(ij) by a "basket" provision for "articles, not specially provided for." *J.E. Bernard & Co.* v. *United States,* 62 Cust. Ct. 536, C.D. 3822, 299 F. Supp. 1129 (1969), *aff'd,* 58 CCPA 91, C.A.D. 1009, 436 F.2d 506 (1971); *Ideal Toy Corp.* v. *United States,* 63 Cust. Ct. 406, C.D. 3926 (1969), *aff'd,* 58 CCPA 9, C.A.D. 996, 433 F.2d 801 (1970).

Plaintiff argues, implicitly, that the provision for "structures and parts of structures" is so broad that it does not "specifically" describe the merchandise within meaning of General Interpretive Rule 10(ij). The Court disagrees.

Tariff items have been held to be "specific" under General Interpretive Rule 10(ij) where merchandise is covered by name or function. *See, e.g., J.E. Bernard & Co.* v. *United States,* 59 Cust. Ct. 31, 36, C.D. 3060 (1967) (electrical components specifically covered by "other electrical apparatus for making * * * or breaking electrical circuits" to preclude classification as parts of projectors).

"Structure" has been defined for tariff purposes as "anything composed of parts capable of resisting heavy weights or strains and artificially joined together for some special use." *United States* v. *Paul M.W. Bruckmann,* 65 CCPA 90, 93, C.A.D. 1211, 582 F.2d 622 (1978), quoting *Simon, Buhler & Baumann, Inc.* v. *United States,* 8 Ct. Cust. App. 273, 276, T.D. 37537 (1918); *S.G.B. Steel Scaffolding and Shoring Co.* v. *United States,* 82 Cust. Ct. 197, 211-213, C.D. 4802 (1979).

This definition is broad, but the scope of the tariff provision is limited by application of the rule of *ejusdem generis.* Where there is an enumeration of specific words of description (*e.g.,* "hangars and other buildings, bridges, bridge sections, lock-gates, towers, lattice masts, roofs, roofing, frameworks etc.") followed by a general term (*e.g.,* "other structures or parts of structures") *ejusdem generis* aids in statutory construction. *See Merck & Co.* v. *United States,* 19 CCPA 16, 18, T.D. 44852 (1931). Under the rule of *ejusdem generis,* which means "of the same kind," where an enumeration of specific things is followed by a general word or phrase, the general word of phrase is held to refer to things of the same kind as those specified. *United States* v. *Damrak Trading Co.,* 43 CCPA 77, 79, C.A.D. 611 (1956). Thus, plaintiff's suggestion that parts of an oil drilling rig not typically considered to be structures—such as the hook, the travelling block, the draw works, and the drill line—would be classifiable as parts of "structures" under item 652.98, TSUS, is misguided, since those parts of the rig are not of the same kind as hangars, bridges, lock-gates, towers, and the other examples. *See S.G.B. Steel Scaffolding and Storing Co.,* 82 Cust. Ct. at 215-218.

The Court follows *J. Ray McDermott & Co.* v. *United States,* 69 Cust. Ct. 197, 208, C.D. 4394 (1972). In *McDermott* the merchandise at issue included an oil platform "jacket", a three-legged tripod-like

portion of an offshore drilling platform. The jacket was classified under item 652.98, TSUS, as "other structures or parts of structures." Plaintiff alternatively claimed classification as part of boring machinery under item 664.50, TSUS. The Court rejected that claim, stating:

> Even if the platform structure may be regarded as a part of boring machinery, which is doubtful, the jacket is more specifically provided for as a part of a structure than as part of boring machinery. A part of a particular part is more specifically provided for as a part of the part than as a part of the whole.

69 Cust. Ct. at 208 (footnote omitted).

Although, as plaintiff says, the articles in this action are undoubtedly parts of boring machinery, since the merchandise is integral to the drilling operation and has no commercial identity apart from parts of oil drilling rigs, *see Nissho Iwai American Corp.* v. *United States,* 8 CIT 264, 602 F. Supp. 88 (1984), this fact does not distinguish *McDermott* from this action. The "part of a part" principle applied in *McDermott* is equally applicable in this action. The Court holds that the provision for "structures and parts thereof" describes the function of the imported merchandise.

In the event the mast parts were not parts of structures the mast components would nonetheless be classifiable under items 652.98 and 652.99, TSUS, since the mast components, when assembled, are "lattice masts" which are *eo nomine* provided for in the superior heading to items 652.98 and 652.99, TSUS. "Lattice" is defined as "a framework or structure of * * * metal made by crossing laths or other thin strips so as to form a network." *Websters' Third New International Dictionary* 1277 (1961).

Plaintiff argues that the term "lattice mast" is not known to the petroleum industry, and therefore does not apply to the assembled imported components. Proof of commercial designation is a question of fact, *Tower & Sons* v. *United States,* 11 Ct. Cust. App. 261, T.D. 39080 (1922), for which plaintiff had the burden of proof, since the burden of establishing commercial designation rests upon the party arguing that the commercial meaning of a term differs from its ordinary meaning. *United States* v. *Simon Saw & Steel Co.,* 51 CCPA 33, 38, C.A.D. 834 (1964).

Plaintiff's witness Frederick Pheasey, Chairman of Dreco, Ltd. of Edmonton, Alberta, manufacturer of the merchandise, stated that the mast portion of assembled merchandise was not a lattice mast because the mast had a "rigid frame". Plaintiff's witness Donald W. Gaddy, Chief Engineer at Penrod Drilling Company of Houston, Texas, which purchased the merchandise, said that the mast was not a lattice mast because lattice masts are made of "tubular construction." Both Pheasey and Gaddy said the mast is known in the industry as a "cantilevered mast." Plaintiff's final witness, Joe Fowler, of Stress Engineering Services, Inc., a consulting engineer-

ing company based in Houston, conceded that the assembled mast had "some elements of a lattice structure," but said the mast was better described as a "space frame" or "built-up column." The Court finds the testimony of these witnesses inconsistent and ambiguous.

The Court finds more persuasive the testimony of defendant's witnesses, Dr. Augusto L. Podio, Professor of Petroleum Engineering at the University of Texas at Austin, and Paul Borg, Vice-President of Pyramid Manufacturing Company of Houston, a manufacturer of drilling equipment, who testified that the mast when assembled, met the following specifications of the American Petroleum Institute (API) for Drilling and Well Servicing Structures 4E:

> *3.8 Portable Mast Without Guylines-Static.* A portable mast without guylines is generally a rectangular cross section structure, *latticed on three or four sides,* of welded, bolted or pinned construction; is assembled at or near ground level; attached to a substructure; is raised as a unit to the drilling position and is not dependent upon external guying for stability [emphasis added].

The specification for "Portable Mast Without Guylines-Dynamic" contains the same language as to latticing *i.e.,* "latticed on three or four sides."

The Court holds that plaintiff has failed to establish a commercial meaning of "lattice masts" different than the common meaning and which would exclude the assembled imported merchandise.

Plaintiff also argues that even if the assembled components are a lattice mast within the common meaning of the term, the fact that the assembled articles are known as "cantilevered masts" in the trade precludes classification as "lattice masts". But the term "lattice masts" is generic, and the fact that the merchandise may be commercially known by a specific name ("cantilevered masts") is insufficient to exclude the merchandise from classification under the generic term ("lattice masts"). *See S.G.B. Steel Scaffolding & Shoring Co.* v. *United States,* 82 Cust. Ct. 197, 210, C.D. 4802 (1979). *Heads & Threads, Division of MSL Industries, Inc.* v. *United States,* 60 Cust. Ct. 308, 314 C.D. 3374, 282 F. Supp. 484, 489-90 (1968). According to plaintiff's witnesses Pheasey and Gaddy the term "cantilevered mast" in the trade refers to masts assembled horizontally and then raised to the vertical position. The imported mast components could be described as parts of "cantilevered lattice masts."

If the components of the masts were not classifiable as parts of structures, the Court would hold that they are parts of "lattice masts" which are *eo nomine* provided for in the superior heading to items 652.98 and 652.99, TSUS. Applying General Interpretive Rule 10(ij), the Court alternatively holds that the imported components of masts are properly classifiable under items 652.98 and 652.99, TSUS, as parts of lattice masts which are in turn parts of oil well drilling rigs.

Plaintiff argues that if the imported articles are parts of structures, they are parts of structures more specifically provided for as "columns, pillars, posts, beams, girders and similar structural units" under item 652.94, TSUS. This claim also fails.

Plaintiff makes two arguments that the merchandise is within item 652.94, TSUS. First, plaintiff says that the merchandise when assembled, comprise "built-up columns." But the merchandise did not enter as complete articles and, since item 652.94, TSUS, has no provision for parts, this claim fails.

Second, plaintiff says that the various components of the mast, substructure, floor assembly and engine stand, in their condition as imported, are "columns, pillars, posts, beams, girders, and similar structural units," within item 652.94, TSUS.

Since there is no provision for parts in item 652.94, TSUS, this provision has been interpreted to require that the imported merchandise be "*a unitary element* providing * * * support to a building or structure." *Laurence Myers Scaffolding Co.* v. *United States*, 57 Cust. Ct. 333, 340, C.D. 2809, 259 F. Supp. 874, 879, (1966) (emphasis added). *See Frost Railway Supply Co.* v. *United States*, 39 CCPA 90, C.A.D. 469 (1951). Merchandise is not of "unitary construction" if it "consist[s] of more than one piece of metal." *Id.* at 95.

In its proposed findings of fact, plaintiff proposes no factual findings with respect to its claims under item 652.94, TSUS. If a unitary element was contained in any of the entries, plaintiff does not indicate in its post-trial brief which of the examples contained in item 652.94, TSUS, it believes describes a unitary element, nor does plaintiff cite to any testimony which supports the classification of any particular fabricated component in its condition as imported under item 652.94, TSUS. The Court finds that the merchandise in this action is not of unitary construction, but consists of various pieces joined by means of lugs, pins or welding, and holds the merchandise is not classifiable under item 652.94, TSUS.

Finally, defendant urges that Customs classification of the sheaves is incorrect and that the sheaves are properly classified as "pulleys * * * and parts thereof" under item 680.50, TSUS. Plaintiff's witnesses Pheasey and Gaddy testified that sheaves are pulleys. Plaintiff does not oppose this classification in its post-trial brief. Applying General Interpretive Rule 10(ij) the Court holds that the sheaves are specifically provided for as pulleys under item 680.50, TSUS.

To conclude, the Court holds that plaintiff has failed to overcome the presumption of correctness that attaches to Customs classification and applying General Interpretive Rule 10(ij) the parts of the mast, substructure, floor assembly, and engine stand are classifiable as parts of structures under items 652.98 or 652.99, TSUS; and that the sheaves are classifiable under item 680.50, TSUS, as pulleys.

Judgment will be entered accordingly. So ordered.

(Slip Op. 86-58)

CERAMICA REGIOMONTANA, S.A., ET AL., PLAINTIFFS AND INTERNACIONAL DE CERAMICA, PLAINTIFF-INTERVENOR *v.* UNITED STATES, ET AL., DEFENDANTS AND TILE COUNCIL OF AMERICA, INC., DEFENDANT-INTERVENOR

Before RE, *Chief Judge.*

Court No. 84-3-00387

MEMORANDUM OPINION AND ORDER

Plaintiffs, joined by plaintiff-intervenor, move for judgment on the agency record pursuant to Rule 56.1. Plaintiffs contend that countervailing duty rate determination by the International Trade Administration (ITA) is not supported by substantial evidence and is not in accordance with law.

Held: The methodology employed by the ITA in calculating the countervailing duty rate is in accordance with law, and its determination is supported by substantial evidence. Therefore, plaintiffs' motion is denied, and the action is dismissed.

[Plaintiffs' motion is denied; and the action is dismissed.]

(Decided May 29, 1986)

Brownstein Zeidman and Schomer (Irwin P. Altschuler, Steven P. Kersner, and *David R. Amerine)* for the plaintiffs.

Wilkie Farr & Gallagher (Noel Hemmendinger, Walter J. Spak, and *Jeffrey W. Carr)* for the plaintiff-intervenor.

Richard K. Willard, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch *(A. David Lafer)* for the defendant.

Howrey and Simon (David C. Murchison, John F. Bruce, Kevin P. O.' Rourke, and *Rosemary Henry)* for the defendant-intervenor.

RE, *Chief Judge:* Plaintiffs, Ceramica Regiomontana (Ceramica) and Industrias Intercontinental (Industrias), contest the final results of an administrative review by the International Trade Administration (ITA) of the Commerce Department of a countervailing duty order for ceramic tile from Mexico. 49 Fed. Reg. 9,919 (1984). The administrative review was conducted pursuant to section 751 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675 (1982). Plaintiffs are joined in their motion by plaintiff-intervenor Internacional De Ceramica (Interceramica).

Plaintiffs have moved for judgment upon the agency record, pursuant to Rule 56.1 of the Rules of this Court. Defendant, United States, opposes this motion, and urges that the ITA's determination be upheld. Defendant-intervenor, Tile Council of America, also opposes the plaintiffs' motion.

Plaintiffs contend that the methodology used by the ITA to calculate the countervailing duty rates was improper and not supported by substantial evidence. After reviewing the administrative record, the pleadings and contentions of the parties, and the supporting papers, this Court holds that the determination made by

the ITA is supported by substantial evidence on the record, and is in accordance with law. Consequently, plaintiffs' motion for judgment on the agency record is denied.

Administrative Proceedings

On May 10, 1982, the ITA issued its *Final Affirmative Countervailing Duty Determination; Ceramic Tile from Mexico and Countervailing Duty Order,* with respect to imports of ceramic tile manufactured, produced and exported from Mexico. 47 Fed. Reg. 20,012 (1982). The ceramic tile covered in the investigation included nonmosaic, glazed and unglazed ceramic floor and wall tile classifiable under items 532.24 and 532.27 of the Tariff Schedules of the United States (TSUS). In this investigation, commenced in response to a petition filed by the defendant-intervenor Tile Council of America, the ITA determined that three programs implemented by the Mexican Government constituted countervailable subsidies. These programs are CEDI, FOMEX, and CEPROFI.

Pursuant to the first program, Certificado de Devolucion de Impuesto (CEDI), a certificate is issued by the government of Mexico in an amount equal to a percentage of the value of exported merchandise. The CEDI certificates may be used to pay a variety of federal tax liabilities, such as payroll taxes, value added taxes, federal income taxes, and import duties. From January 1, 1982 through August 25, 1982, the CEDI rate was 15 percent of the value of exports, and zero for the remainder of 1982 because the Mexican Government suspended the CEDI program for all exports on or after August 26, 1982.

The Fund for the Promotion of Exports of Mexican Manufactured Products (FOMEX) is the second program found by the ITA to constitute a countervailable subsidy. FOMEX is a trust fund established by the Mexican Treasury Department, with the Bank of Mexico acting as trustee. Through financial institutions, the Bank of Mexico makes FOMEX loans available at preferential rates to manufacturers and exporters for pre-export production and export financing.

Certificates of Fiscal Promotion (CEPROFI), the third program, are tax certificates which are used to promote the goals of the National Industrial Development Plan. These certificates are granted in conjunction with investments in designated industrial activities and geographic regions, and may be used to pay a wide range of federal tax liabilities.

Plaintiffs do not contend that these programs are not countervail-able subsidies. Instead, plaintiffs object to the methodology employed by the ITA in calculating a single countervailing duty rate for all Mexican exporters of ceramic tile to the United States who received benefits under any of the three programs. Specifically, plaintiffs challenge the ITA's calculation of the country-wide duty rate attributable to CEDI benefits.

On January 18, 1983, the ITA notified the Mexican Government that it was conducting its periodic administrative review of the countervailing duty order on ceramic tile from Mexico, pursuant to section 751 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675(a). The ITA asked the Mexican government to complete a countervailing duty questionnaire pertaining to ceramic tile exports for 1982. The ITA requested information regarding the rate of CEDI benefits applicable to exports of ceramic tile in 1982. The ITA also requested a list of all firms that received CEDI benefits during 1982 and the amounts received by each firm. The ITA further requested a list of FOMEX loans and loan terms granted to ceramic tile firms during 1982. With respect to CEPROFI benefits, the ITA requested a listing of each ceramic tile firm receiving these benefits and the amount of benefit received in 1982. The ITA informed the Mexican government that firms that did not receive any subsidy benefits could avoid the countervailing duty deposit rate by applying for a zero deposit rate. To qualify for a zero deposit rate, firms were required to certify that they did not apply for or receive benefits under the CEDI, FOMEX or CEPROFI programs, and would not apply for these benefits in the future.

The Mexican government responded to the ITA's questionnaire on March 14, 1983. The Mexican government stated that it did not maintain consistent statistics on ceramic tile exports because these products were grouped with others in its export records. Nevertheless, it attemped to compile the requested data. The Mexican government reported that 29 firms exported ceramic tile to the United States in 1982. According to the Mexican government, six of these firms received CEDI benefits. CEDI benefits were provided, the Mexican government stated, at a rate of 15 percent of the export value. The goverment requested that 15 of the 29 firms receive the zero duty deposit rate because they did not receive benefits under any countervailable program.

From April 26, 1983 through May 6, 1983, ITA personnel conducted a verification investigation in Mexico of the information provided by the Mexican government. These officials met with representatives of the Mexican government and with officials of various ceramic tile firms to verify the countervailing duty questionnaire responses. The Mexican government confirmed that the CEDI rate for 1982 had been increased from 10 percent to 15 percent in March 1982, retroactive to January 1, 1982. The government also confirmed that the CEDI benefit program was suspended on August 25, 1982, and did not apply to any shipments exported on or after August 26, 1982.

At verification, ITA officials reviewed the records of the two largest exporters of ceramic tile to the United States, plaintiffs Ceramica and Industrias. During review of Industrias, a significant discrepancy was discovered between the amount of CEDI benefits reported by the Mexican government and the figures kept by Indus-

trias. Officials at Industrias informed the ITA that the correct CEDI figure for exports to the United States was much higher than the figure the Mexican government had originally reported. Industrias then provided the ITA with a revised amount of CEDI benefits the firm received in 1982. In June 1983 the Mexican government provided the ITA with revised figures on the CEDI benefits received by Industrias. The ITA, however, was not able to verify these figures as accurate. Also at verification, officials at both Ceramica and Industrias indicated that their firms took full advantage of the CEDI program.

The ITA issued the preliminary results of the administrative review on September 26, 1983. 48 Fed. Reg. 43,705 (1983). the ITA determined that ten firms met the zero duty certification requirements. The ITA also determined that the net total subsidy for 1982 under the CEDI program was equal to 10.27 percent *ad valorem*. 48 Fed. Reg. at 43,706. An internal ITA memorandum, dated July 14, 1983, explained the methodology used to arrive at the 10.27 percentage rate:

> *CEDI*. This is a subsidy available on all exports. The rate was 15% for exports from January 1–August 25, 1982. CEDI was suspended for all exports from Mexico on or after August 26, 1982. Rather than issuing two separate rates, I calculated a weighted average for the year. I took the IM 146 import statistics for January–August 1982 times 15 percent to get the theoretical maximum CEDI benefit for 1982, and divided that by the total IM 146 import figures for 1982 to get the weighted average of 10.27 percent.

A.R. 443–44. The effect of the weighted average, therefore, was to reduce the 15 percent benefit to 10.27 percent to account for the termination of CEDI benefits, effective August 26, 1982.

The final results of the 1982 administrative review were published on March 16, 1984. 49 Fed. Reg. 9,919 (1984). The ITA basically used the same methodology it utilized in its preliminary determination, with two exceptions. First, the ITA eliminated data covering imports prior to February 23, 1982, to coincide with the period under review. Second, the ITA included data concerning advance CEDI benefits. In light of these adjustments, the ITA determined that the total subsidy benefit under the CEDI program was 9.19 percent *ad valorem*, with a combined total under all the programs of 16.49 percent *ad valorem*. 49 Fed. Reg. at 9,920. The ITA also confirmed its preliminary determination that ten firms were eligible for a zero deposit rate. 49 Fed. Reg. at 9,920. In explaining its calculation of CEDI benefits, the ITA stated:

> [S]ince all firms received the maximum rate (15 percent) upon approval of their applications for individual shipments, we applied the maximum rate while providing for a certification process that would allow zero rates for firms not applying for or receiving any countervailable benefits. To calculate a

> weighted-average CEDI rate (reflecting suspension of the program in August 1982), we used U.S. import statistics since there were no consistently calculated figures from the Mexican Government which we could break down * * *.

49 Fed. Reg. 9,919.

Plaintiffs filed the present action on March 22, 1984 in this Court, challenging the ITA's results of the administrative review. This Court is authorized to review determinations of the ITA which impose a countervailing duty on foreign exporters of products into the United States. 19 U.S.C. § 1516a(a)(2)(B) (West Supp. 1985). In reviewing determinations of the ITA, this Court will hold such findings unlawful only when the conclusions reached by the ITA are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B).

Plaintiffs contend that the methodology used by the ITA in reaching the countervailing duty assessment rate for the CEDI program is not in accordance with law, and not supported by substantial evidence. The question presented in this case is whether the ITA properly applied the standard 15 percent CEDI benefit, as adjusted by weighted average to account for termination of the program, in calculating a country-wide countervailing duty rate for the CEDI benefit program.

Standard of Review

In reviewing a countervailing duty rate determination by the ITA, the standard of review is not *de novo.* Rather, it is the role and function of the Court of International Trade to determine whether the methodology used by the ITA is in accordance with law, and whether the ITA's conclusion is supported by substantial evidence on the record.

Pursuant to well established principles of administrative law, a reviewing court must accord due weight to an agency's interpretation of a statute that it administers. *See, e.g., United States* v. *City of Fulton,* — U.S. — , 106 S. Ct. 1422, 1428 (1986); *Zenith Radio Corp.* v. *United States,* 437 U.S. 443, 450–51 (1978); *American Lamb Co.* v. *United States,* 785 F.2d 994, 1001 (Fed. Cir. 1986). Thus, this Court will defer to the agency's interpretation of the statute, provided the interpretation is "sufficiently reasonable." *See, e.g., Federal Elec. Comm.* v. *Democratic Senatorial Campaign Committee,* 454 U.S. 27, 39 (1981); *American Lamb Co.* v. *United States,* 785 F.2d 994, 1001 (Fed. Cir. 1986). The extent or degree to which the Court should defer to the agency is dependent upon a number of factors. As the Supreme Court explained in a leading case,

> We consider that the rulings, interpretations and opinions of the [administrative official], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judg-

> ment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Skidmore v. *Swift & Co.,* 323 U.S. 134, 140 (1944).

The deference granted or extended to the agency's interpretation of its statutory mandate also applies to the methodology that the agency employs in fulfilling its lawfully delegated mission. *American Lamb Co.,* 785 F.2d at 1001; *Consumer Products Div., SCM Corp.* v. *Silver Reed America, Inc.,* 753 F.2d 1033, 1039 (Fed. Cir. 1985); *Melamine Chemicals, Inc.* v. *United States,* 732 F.2d 924, 928 (Fed. Cir. 1984). In order for the ITA effectively to administer the countervailing duty laws, it is necessary to permit some methodological flexibility. As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology. *See Chevron U.S.A. Inc.* v. *Natural Resources Defense Council,* 467 U.S. 837, 843 (1984); *Abbott* v. *Donovan,* 6 CIT 92, 570 F. Supp. 41, 46–47 (1983).

Of course, this Court will not allow an agency, under the guise of lawful discretion, to contravene or ignore the intent of the legislature or the guiding purpose of the statute. *See Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S.A. 837, 843–44 (1984); *Board of Governors of the Federal Reserve System* v. *Dimension Financial Corp.,* — U.S. —, 106 S. Ct. 681, 686 (1986). As the Supreme Court has emphasized, "Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise,* the strength of modern government, can become a monster which rules with no practical limits on its discretion.'" *Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Automobile Ins. Co.,* 463 U.S. 29, 48 (1983) (emphasis in original) (quoting *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 167 (1962) and *New York* v. *United States,* 342 U.S. 882, 884 (1951) (Douglas J., dissenting)). Indeed, it may be said that deference to an agency's interpretation represents a *judicial* determination that the agency's interpretation falls within the scope of the authority that has been properly delegated by the Congress. *See Montana* v. *Clark,* 749 F.2d 740, 745 (D.C. Cir. 1984), *cert. denied,* 106 S. Ct. 246 (1985). Thus, in reviewing a countervailing duty rate determination by the ITA, the court must ensure that the ITA's methodology is a reasonable means of assessing the net benefit received as a result of the illegal subsidy or grant. *See Industrial Fasteners Group, American Importers Ass'n* v. *United States,* 710 F.2d 1576, 1580–81 (Fed. Cir. 1983).

The court must also ensure that the agency's conclusions are supported by substantial evidence on the record as a whole. Substantial evidence is something more than a "mere scintilla," and must be enough reasonably to support a conclusion. *Consolidated Edison Co.* v. *United States,* 305 U.S. 197, 229 (1938); *Matsushita Elec. Indus. Co.* v. *United States,* 750 F.2d 927, 933 (Fed. Cir. 1984); *Smith-Corona Group* v. *United States,* 713 F.2d 1568, 1571 (Fed. Cir. 1983).

VERIFICATION

In this case, the ITA's verification trip to Mexico revealed that the Mexican government's response to the countervailing duty questionnaire was inaccurate as to both total exports and total CEDI benefits. The Mexican government's figure for total exports to the United States was approximately 25 percent less than what the U.S. import statistics revealed. Furthermore, the ITA discovered that plaintiff Industrias actually received benefits under the CEDI program almost 25 times the amount reported by the Mexican government.

Reviews under section 751 are conducted annually upon request, and must be completed within stringent deadlines. *See* 19 U.S.C. § 1675(a) (West Supp. 1985). In conducting a review under section 751, the ITA is required to verify all information relied upon in its determination. *See* 19 U.S.C. § 1677e(a) (1982) (amended 1984). Hence, when the ITA requests information, it is vital that accurate information be provided promptly to allow the agency sufficient time for review. *See Atlantic Sugar, Ltd.* v. *United States,* 744 F.2d 1556, 1560 (Fed. Cir. 1984). When the ITA "is unable to verify the accuracy of the information submitted, it shall use the best information available to it as the basis for its action * * *." 19 U.S.C. § 1677e(a) (West Supp. 1985). Section 776(b) of the Tariff Act of 1930 provides:

> (b) *Determinations to be made on the best information available.*—In making their determinations under this subtitle, the administering authority and the Commission shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available.

19 U.S.C. § 1677e(b) (1982).

In this case, the ITA determined that the statistics submitted by the Mexican government with respect to CEDI benefits did not provide an adequate basis accurately to assess benefits under this program. In an export market comprised of 29 firms, it would be impractical for the ITA to verify information pertaining to each individual firm. Thus, the ITA must sample representative firms. If the information received at the representative firms proves, as here, inaccurate in significant and material respects, it would be point-

less to require that the ITA nevertheless use all information not proven incorrect. The Court will not require the ITA to use portions of the information received from the Mexican government and apply it to some firms, while relying on U.S. statistical figures for other firms in calculating the countervailing duty rate. Since the information supplied by the Mexican government was found, upon verification, to be inaccurate in important respects, the ITA was under no obligation to use it even though some of it had not been proven inaccurate. Thus, the ITA's decision to employ the standard 15 percent CEDI rate, in conjunction with U.S. import statistics, as the best information available was supported by substantial evidence, and in accordance with law.

Calculation of Benefits

In calculating the subsidy benefits under the CEDI program, the ITA used the standard 15 percent rate because benefits were provided at that rate upon approval of the exporter's application. There is substantial evidence on the record to support the ITA's conclusion that the full 15 percent was granted to all importers who applied and conformed to certain minimal, technical requirements. Plaintiffs contend that the ITA has overstated the net benefit received under the CEDI program because some exporters of ceramic tile who did not qualify for the zero deposit rate did not apply for or receive CEDI benefits on all export shipments. Plaintiffs argue that the ITA should have calculated a national average CEDI benefit rate, rather than applying the 15 percent rate to all exporters who did not receive zero deposit status.

To calculate a national average, the ITA would have to compare total value of CEDI benefits granted as reported by the Mexican government with the total exports to the United States to arrive at an average. This average would then be applied to all firms not eligible for zero duty deposit status. However, since the ITA was unable to verify the Mexican government's figure for total CEDI benefits, this proposed methodology would require the ITA to rely on unverified information in contravention of the statute. Instead, the ITA chose to use the full 15 percent of export value for CEDI benefits, adjusted to 9.19 percent to account for the program's cessation in August 1982.

In the absence of verified information, the Court cannot say that the ITA erred in assuming maximum utilization of available benefits. The fact that some small ceramic tile firms, for reasons of convenience, or otherwise, did not always apply for CEDI benefits does not alter this conclusion. Indeed, the past administrative practice of the ITA has been to assume maximum utilization of countervailable programs where benefits were provided upon the fulfillment of certain ministerial or minimal requirements. *See, e.g., Ferroalloys from Spain,* 48 Fed. Reg. 4019, 4020 (1983); *Vitamin K from Spain,* 48 Fed. Reg. 40770, 40770–71 (1983); *Chains and Parts There-*

of, of Iron or Steel from Spain, 48 Fed. Reg. 37505, 37505 (1983). Moreover, both Ceramica and Industrias acknowledge taking full advantage of the CEDI benefit program.

There are limitations on the resources of the ITA which do not permit the agency to undertake a firm-by-firm review in order to establish and apply specific duty rates to every firm. These limitations include strict time constraints, budgetary restrictions, and the availability of qualified personnel. To require the ITA to analyze and investigate the books and records of every firm that disputes a countervailing subsidy deposit rate would, in effect, handicap or impede the agency by severely decreasing its ability to function effectively and efficiently. It is for these reasons that it is the general practice of the ITA to calculate a country-wide countervailing duty rate. A country-wide duty rate allows the ITA to establish one deposit rate for all exporters from a particular country, rather than attempting to determine the actual benefit received by each firm and setting separate rates. Country-wide rates are particularly useful where, as here, a large number of companies are involved. As the ITA stated in its final determination, "[w]e cannot possibly hope to conduct timely administrative reviews under section 751 unless we generally impose country-wide countervailing duty rates." 49 Fed. Reg. at 9,920.

It may be noted that Congress has endorsed the practice of publishing a country-wide countervailing duty rate by enacting a legislative presumption in favor of a country-wide rate. *See* Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 607, 98 Stat. 2948, 3029 (codified at 19 U.S.C. § 1671(e)(2) (West Supp. 1985)). The legislative history of the Act indicates that:

> This provision is intended to lessen the administrative burden on the administrative authority stemming from implementing company-specific rates. The amendment continues to permit individual company rates for significant differences in benefits. The administrating authority is expected to determine under what conditions company-specific rates are appropriate * * *.

H.R Rep. No. 1156, 98th Cong., 2d Sess. 180, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4910, 5297. While courts are reluctant to attribute undue significance to the opinion of a later Congress as to a previously enacted statute, the unequivocal ratification of an established administrative practice is persuasive. *See, e.g., Bob Jones University* v. *United States,* 461 U.S. 574, 599-602 (1983); *Haig* v. *Agee,* 453 U.S. 280, 300-01 (1981); *Nissho-Iwai American Corp.* v. *United States,* 10 CIT ——, Slip Op. 86-27, at 14-16 (1986). In this case the establishment of a country-wide rate is clearly consistent with prior administrative practice, and well within the permissible scope of the agency's discretion. This Court finds that the ITA's utilization of a country-wide duty rate, which excluded firms that received no countervailable subsidies, was reasonable and proper.

It is noted that not all Mexican firms who did not qualify for zero deposit status received benefits under all three countervailable programs. For example, in 1982, Ceramica did not receive any FOMEX export loans and Industrias did not receive any benefits under the CEPROFI program. In calculating benefits under the FOMEX and CEPROFI programs, the ITA relied on information received by the Mexican government as to benefits actually dispensed under these programs. The ITA averaged the net benefits received among all firms receiving benefits, and included an average for each program in the country-wide duty rate.

Plaintiffs do not contest these calculations, but argue that the ITA was inconsistent in averaging the Mexican government's figures for FOMEX and CEPROFI, while using a weighted average based on the standard benefit for CEDI.

The Court finds this argument without merit. The ITA's decision to rely on the government figures to calculate a net average benefit for CEPROFI and FOMEX was clearly based on a reasoned determination that the information pertaining to these programs was verified and reliable. On the other hand, it is equally clear that the ITA made a reasoned determination that the figures complied by the Mexican government were not a sufficient basis from which to calculate an accurate national average for CEDI benefits. Thus, the ITA chose not to attempt to compile a national average of CEDI benefits received, but rather applied the 15 percent standard benefit as the basis for its calculations. On the record in this case, the Court cannot hold that this decision was not in accordance with law or unsupported by substantial evidence.

Plaintiffs' proposed national average would result in a downward adjustment of the 15 percent benefit available, and would provide plaintiffs, Ceramica and Industrias, with a windfall. By utilizing the 15 percent rate, the ITA has established a system which prevents the larger Mexican firms, who admit receiving maximum CEDI benefits, from paying a reduced countervailing duty rate because some smaller firms did not apply for subsidies. It is not the function of this court to formulate a specific methodology for an administrative agency, but rather to ensure that the methodology used by the ITA is in accordance with the law.

Conclusion

The evidence on the record indicates that all Mexican exporters of ceramic tile who applied timely for CEDI benefits received the maximum benefit of 15 percent. Since it was impossible to verify the total CEDI benefits dispensed by the Mexican government, the ITA assumed that those firms that received benefits received the full 15 percent. The agency established the zero duty deposit rate for firms that did not receive benefits under any of the Mexican subsidy programs. Any other method to obtain a more precise calculation of benefits to individual firms would have been both

unduly burdensome and unverifiable. Moreover, the method proposed by the plaintiffs would have been much less precise, and would have resulted in a gross undervaluation of the benefits these plaintiffs received.

In view of the foregoing, the Court concludes that, under the circumstances, the ITA's methodology is reasonable, and is consistent with the purposes of the countervailing duty law to protect domestic producers from import competition which has benefited from illegal bounties or grants. In addition, the Court finds that substantial evidence on the record supports the agency's conclusion. Therefore, the determination of the ITA is affirmed, and plaintiffs' motion for judgment on the agency record is denied.

(Slip Op. 86-59)

UNITED STATES OF AMERICA, PLAINTIFF *v.* SCOPE IMPORTS, INC. AND RICHWAY STORES, INC., DEFENDANTS

Court No. 85-05-00646

MEMORANDUM AND ORDER

[Defendants' motions for more definite statements denied.]

(Dated June 2, 1986)

Richard K. Willard, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Sheila N. Ziff*) for the plaintiff.

Givens, Kelly and Shaw (*Robert T. Givens*) for defendant Scope Imports, Inc.

Givens, Kelly and Shaw (*Sharon Steele Doyle*) for defendant Richway Stores, Inc.

AQUILINO, *Judge:* In response to the original complaint, the defendants interposed essentially identical motions for more definite statements pursuant to CIT Rule 12(e). The plaintiff thereafter served and filed an amended complaint, wherein three counts charge defendant Scope Imports, Inc., in the alternative, with fraud, gross negligence and negligence within the meaning of 19 U.S.C. §1592(a)(1). A fourth count alleges negligence on the part of defendant Richway Stores, Inc.

The precatory language of Rule 12(e) is "pleading * * * so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading". To the extent fraud is alleged, CIT Rule 9(b) applies as follows:

> In all averments of fraud * * * the circumstances constituting fraud * * * shall be stated with particularity.

This requirement of particularity, however, does not abrogate the general rules of pleading set forth in CIT Rule 8, nor does it require the pleading of detailed evidentiary matter. *See, e.g.*, 2A Moore's Federal Practice §9.03, at 9-28 to 9-30 (1979).

The proposed orders presented by the defendants in conjunction with their motions clearly indicate that they seek the revelation of evidentiary matter as opposed to learning the nature of plaintiff's claims. Furthermore, the court concludes after review of the amended complaint that the allegations therein meet the criteria of the above-cited rules of practice. That is, plaintiff's pleading is not so vague or ambiguous that the defendants herein cannot reasonably be required to frame responsive pleadings. As for the fraud claim(s), the circumstances are pleaded with sufficient particularity. *See generally United States* v. *F.A.G. Bearings Corporation,* 8 CIT 201, 615 F. Supp. 562 (1984). *Cf. Simcox* v. *San Juan Shipyard, Inc.,* 754 F.2d 430, 439 (1st Cir. 1985); *Haroco, Inc.* v. *American National Bank & Trust Co. of Chicago,* 747 F.2d 384, 405 (7th Cir. 1984), *aff'd on other grounds,* 105 S. Ct. 3291 (1985); *Seville Industrial Machinery Corp.* v. *Southmost Machinery Corp.,* 742 F.2d 786, 791 (3d Cir. 1984), *cert. denied,* 105 S. Ct. 1179 (1985).[1]

In view of the foregoing, it is

ORDERED that defendants' motions for more definite statements be, and they hereby are, denied; and it is further

ORDERED that the defendants shall have until June 23, 1986 in which to answer or otherwise respond to plaintiff's First Amended Complaint; and it is further

ORDERED that counsel for each of the parties be available for a scheduling conference by telephone pursuant to CIT Rule 16(b) at 11:30 a.m. EDT on June 30, 1986.

(Slip Op. 86-60)

DOMINION VENTURES, INC., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 79-8-01292

Before DICARLO, *Judge.*

Plaintiffs challenge the United States Customs Service's classification of commemorative labels as articles of gold under item 656.10, Tariff Schedules of the United States (TSUS).

Held: Although gold is the component material of chief value at the time of manufacture, the merchandise consists essentially of printed matter, and is classifiable as "pictorial matter produced by relief or stencil printing process" under item 274.70, TSUS.

[Judgment for plaintiffs.]

(Decided June 5, 1986)

Donohue and Donohue (John P. Donohue) for the plaintiffs.

---

[1] The rule under review in each of those circuit cases was 9(b) of the Federal Rules of Civil Procedure which is verbatim the CIT rule and interpreted in the same manner. *See, e.g., United States* v. *Priscilla Modes, Inc.,* 9 CIT ——, Slip Op. 85-122 at 3 (Nov. 27, 1985).

Richard K. Willard, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, Department of Justice (*Kenneth N. Wolf*) for the defendant.

Memorandum Opinion and Order

DiCarlo, *Judge:* Plaintiffs contest the United States Customs Service (Customs) classification of merchandise imported from the United Kingdom as "Articles of precious metal, including rolled precious metal: * * * of gold, including rolled gold" under item 656.10, Tariff Schedules of the United States (TSUS). Plaintiffs claim that the merchandise is properly classified as "pictorial matter produced by relief or stencil printing process * * * and not specially provided for * * * Other," under item 274.70, TSUS, or as "Printed matter not specially provided for: * * * Other," under item 274.90, TSUS. The Court holds that Customs classification is incorrect, and that the merchandise is properly classified under item 274.70, TSUS.

At trial plaintiffs produced five witnesses and defendant none. On the basis of the stipulated facts, the testimony and exhibits offered at trial, the Court's assessment of the credibility of the witnesses, and its examination of the merchandise, the Court makes the following factual findings.

The articles in issue resemble postage stamps and are known in the philatelic trade as Staffa stamps or labels (labels). Staffa is a small, uninhabited and privately-owned island located off the coast of Scotland. The labels are not issued by a governmental body, but are produced privately and sold in the United States as collectibles.

The labels consist of a paper backing to which a gold surface is affixed. Gold is the component material of chief value at the time of manufacture. The merchandise is produced by a relief or stencil printing process variously known as embossing, steel dye engraving, blind embossing or printing in relief. The labels are each sold at retail in the United States at prices ranging from $20 to $25, and were entered at values ranging from $4.50 to $5.00 per piece. The labels each contain a few cents worth of gold. Although the larger labels contain a larger gold surface, there is no difference in price between large and small labels. There is no correlation between the price of gold and the value of the labels, and it is commercially unfeasible to remove the gold from the labels.

The textual matter on the labels identifies Staffa as the issuing authority, the denominational value, the fact that it is 23 karat gold, and additional words or phrases that vary depending on the theme of the label. The center portion of each label carries pictorial matter pertinent to some commemorative event as, for example, seals of each of the original Thirteen Colonies or a reproduction of a king, queen or flag.

The merchandise is sold at retail in the United States principally through direct mail marketing. The labels are marketed either as a

single offering or as part of a group of labels united by a common theme, which is communicated by the textual and pictorial elements on the labels. Sales vary depending on the popularity of the theme depicted on the labels.

The sales brochures used to promote the merchandise place overwhelming emphasis on the gold content of the labels, suggesting that they have intrinsic value as gold articles. Since the labels actually offer no practical investment potential as gold articles, the brochures are misleading and some possibly fraudulent.

The issue presented is whether the merchandise consists "essentially of textual or pictorial matter produced by any printing process" within the meaning of Schedule 2, Part 5, headnote 1. Defendant concedes that if it does, the merchandise is more specifically provided for under one of the provisions of Schedule 2, Part 5 than under the classified provision.

Defendant argues that the gold content of the merchandise and the manner in which it is sold preclude a finding that the labels consist essentially of textual or pictorial matter. In *Norman G. Jensen, Inc.* v. *United States,* 84 Cust. Ct. 76, C.D. 4846, *aff'd,* 68 CCPA 5, C.A.D. 1255, 634 F.2d 1345 (1980), merchandise virtually identical to that in this case was held properly classifiable as articles of gold under item 656.10, TSUS. The Court first rejected the claim that the labels were entitled to duty free entry as postage and revenue stamps since the merchandise did not come within the common meaning of the term postage stamps. The Court also held that the merchandise was not classifiable as pressure sensitive strips under item 790.55, TSUS, or as gold leaf under item 644.52, TSUS.

With respect to the tariff items claimed by plaintiffs in this case, the *Jensen* Court held that the labels could be considered "printed matter" within the purview of Schedule 2, Part 5, TSUS. It held that the merchandise could not be so classified, however, since plaintiffs had failed to prove that the labels consisted "*essentially* of" textual or pictorial matter, under Schedule 2, Part 5, headnote 1:

> The excerpts from the advertising brochure, which the court finds to be the only evidence offered pertinent to the inquiry concerning the essential character of the Staffa stamps, indicate to the court that the desirability of the merchandise is derived equally, if not principally, from the gold as a source of monetary value having an excellent investment potential and as a unique and novel substrate for the design thereon. It cannot be said that the essential character of the merchandise is imparted from the printed matter.

84 Cust. Ct. at 93. On appeal, the Court of Customs and Patent Appeals affirmed, adopting the reasoning of the Customs Court. 68 CC PA at 8, 634 F.2d at 1347.

The Court follows the legal holding in *Jensen* that "for an article to be 'printed matter' under part 5 [of schedule 2], the essential character of the article must be imparted by the textual and pictorial matter contained thereon." 84 Cust. Ct. at 92. But this case differs from *Jensen,* in that the brochures introduced at trial do not constitute the sole evidence pertinent to the essential character of the merchandise. While the manner in which merchandise is advertised and marketed is a factor to be considered in determining its classification, it is not controlling. *Nadel & Sons Toy Corp.* v. *United States,* 4 CIT 20, 22 (1982); *see Guardian Industries Corp.* v. *United States,* 3 CIT 9, 15 n.12 (1982). The Court is not bound by a decision involving similar merchandise where new evidence demonstrates that it should not be followed. *United States* v. *Stone & Downer Co.,* 274 U.S. 225 (1927); *Schott Optical Glass, Inc.* v. *United States,* 750 F.2d 62 (Fed. Cir. 1984).

Defendant argues that the following excerpts from the brochures show that the labels are marketed as gold articles:

> See how suprisingly little it now costs to acquire gold.
>
> A rare series of stamps for collectors and investors minted from pure 23 KARAT GOLD.
>
> A clearly attractive investment that adds to the philatelic value of rare postage stamps the monetary value of genuine gold.
>
> * * * combines the joy of collecting exquisitely worked stamps with the secure feeling of owning precious gold.
>
> * * * it affords you the sound basic investment value of *real gold* as well.
>
> * * * the very first investment to combine the value of stamps and gold to such a high degree.
>
> * * * combines the value of gold and the value of a collectible both.
>
> Precious metal has always been favored as a hedge against inflation. Especially when worked into items that have artistic value as well. A Picasso plate in sterling, for example, has double value. Its artistic value as a Picasso *and* its monetary value as silver.
>
> * * * [the official-seal stamps] have exceptional collector's value because they are extraordinarily rare stamps—minted by hand in high relief, not merely printed. *And* they have definite monetary value as well, because they are made of *pure 23k gold instead of paper.*
>
> * * * the first series of gold stamps ever made in the world. And they are wonderfully oversized—containing *over nineteen square centimeters of 23k gold in each* [emphasis in original].

The Court has examined the brochures and finds that they are at best misleading and have little probative value in determining the essential character of the merchandise. Defendant argues that Customs classification should be upheld since the descriptions of the merchandise in the brochures constitute admissions contrary to the interest of the importer. But it is not the function of the Court to

sustain a higher rate of duty to punish an importer for puffery or even outright fraud. In order to preserve uniformity in Customs law, the Court is bound to ascertain objectively the essential character of the merchandise at the time of importation. *See Peter J. Schweitzer Division, Kimberly-Clark Corp.* v. *Uniied States,* 54 CCPA 44, 45–46, C.A.D. 902 (1967); *F.W. Myers & Co.* v. *United States,* 9 CIT ——, 615 F. Supp. 569, 573 (1985); *PPG Industries, Inc.* v. *United States,* 4 CIT 143, 148 (1982).

Having rejected the brochures as evidence that the labels are properly classified as articles of gold, the Court finds that the evidence demonstrates that the imported articles are pictorial labels, and do not derive their value from their material components. The surfaces of the labels contain only a miniscule amount of gold, offering no practical investment potential as gold articles. The evidence is sufficient to overcome the presumptive correctness of the government's classification and to show that the labels are essentially printed matter under Schedule 2, Part 5, TSUS.

The labels are produced by a relief of stencil printing process within the meaning of the superior heading to item 274.70, TSUS. The labels are collectibles which commemorate themes or events. The essential characteristic of each label is the pictorial matter depicted thereon. The pictorials are the essential characteristics of the labels regardless of the fact that they are printed on paper containing a slight amount of gold.

The merchandise consists essentially of printed matter under Schedule 2, Part 5, headnote 1 TSUS. The labels are more specifically described by item 274.70, TSUS, than by the classified provision or item 274.90, TSUS, since the essential feature of the labels is the pictorial material rather than the related textual matter.

Judgment will be entered accordingly. So ordered.

NOTICE

The Procedural Handbook of the United States Court of International Trade, prepared by the staff of the Office of the Clerk, is now available. The Handbook provides basic information for the practitioner in processing actions under the court's Rules. It is intended to serve solely as a convenient guide and reference source, which consolidates and summarizes various procedures before the court.

The cost of the Handbook is $10.00. If you are interested in receiving a copy of the Handbook, please fill out the form below and return to:

Procedural Handbook
Office of the Clerk
United States Court of International Trade
One Federal Plaza
New York, NY 10007.

ORDER FORM

Enclosed is $______(check or money order) made payable to Clerk, United States Court of International Trade for____ copy or copies of the Procedural Handbook.

NAME ______________________________

(Please type or print)

STREET ADDRESS ________________________

CITY AND STATE ________________________

ZIP CODE ____________________________

PHONE NUMBER ________________________

SUBSCRIPTION ORDER FORM

Customer's Telephone No.'s

Area Code	Home	Area Code	Office

FOR OFFICE USE ONLY	
QUANTITY	CHARGES
______ Publications	______
______ Subscriptions	______
Special shipping charges	______
International handling	______
Special charges	______
OPNR	______
______ UPNS	
______ Balance Due	
______ Discount	
______ Refund	

Enclosed find $.............. (check or money order), or charge to my Superintendent of Documents Deposit Account Number

☐☐☐☐☐☐☐–☐ *Your Order Number..........*

Please send the subscription(s) I have listed to the address shown at the bottom of this form.

MAIL ORDER FORM TO:
Superintendent of Documents
U.S. Government Printing Office
Washington, D.C. 20402

MasterCard

VISA

CHOICE

Credit Card Orders Only
Total charges $______________. Fill in the boxes below:

Credit Card No. ☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

Expiration Date Month/Year ☐☐☐☐

Charge orders may be telephoned to our order desk at (202) 783-3238 from 8:00 a.m. to 4:00 p.m. EST Monday thru Friday (except holidays).

NOTE: Complete top address portion if different from that at the bottom.

Name ....

Street address ....

City and State .... ZIP Code..........

ID	TITLE	PRICE

COMPANY OR PERSONAL NAME

ADDITIONAL ADDRESS/ATTENTION LINE

STREET ADDRESS

CITY

STATE

ZIP CODE

(or) COUNTRY

PLEASE PRINT

Index

U.S. Customs Service

Treasury Decisions

U.S. Court of Appeals for the Federal Circuit

U.S. Court of International Trade

ORDERING OF BOUND VOLUMES

Bound volumes may be obtained by returning the order form supplied herewith to: Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

Recently published bound voumes are noted below:

U.S. Court of International Trade Reports:
Vol. 6, July–December 1983. Supt. Docs. Stock No. 028-003-00054-4;
Cost: $18 domestic; $22.50 foreign;
Vol. 7, January–June 1984. Supt. Docs. Stock No. 028-003-00055-2;
Cost: $20 domestic; $25 foreign;
Vol. 8, July–December 1984. Supt. Docs. Stock No. 028-003-00056-1;
Cost: $19.25 domestic; $24.06 foreign.

GPO : 1986 O - 155-619

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE
WASHINGTON, D.C. 20229

OFFICIAL BUSINESS
PENALTY FOR PRIVATE USE, $300

U.S.MAIL

POSTAGE AND FEES PAID
DEPARTMENT OF THE TREASURY (CUSTOMS)
TREAS. 552

CB SERIA300SDISSDUE021R 1
SERIALS PROCESSING DEPT
UNIV MICROFILMS INTL
300 N ZEEB RD
ANN ARBOR MI 48106